DOCUMENT RESUME

ED 197 488 EA 013 314

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TITLE School Arbitration: What the Arbitrators Are Doing.
INSTITUTION Oregon Univ., Eugene. Center for Educational Policy and Management.
SPONS AGENCY National Inst. of Education (DHEW), Washington, D.C.
PUB DATE 31 Nov 80
NOTE 428p.

EDRS PRICE MF01/PC18 Plus Postage.
DESCRIPTORS *Arbitration; Budgets; *Collective Bargaining; *Court Litigation; Elementary Secondary Education; *Grievance Procedures; Higher Education; Leaves of Absence; Noninstructional Responsibility; Personnel Policy; Public Schools; Teacher Discipline; Teacher Evaluation; Teacher Placement; Teacher Transfer; Unions

ABSTRACT

Eight issues of grievance arbitration in education were chosen for detailed examination in this paper: procedure, budgets, discrimination, leave, extra duty, evaluation, discipline, and assignments and transfers. In addition, the authors identified four types of grievants, including individuals, class or group litigants, school districts, and unions. Of the 840 cases statistically analyzed, only 7 percent involved institutions of higher education; the balance concerned elementary and secondary schools. Two elements were found to be missing in the cases studied: a representative sample of cases involving nonteaching staff, and the mention of the public interest in most of the arbitrator's discussion. In a tabulation of the grievants, 54 percent were individual teachers, equally divided between men and women. Female grievants were found to win 58 percent of their cases and men, 51 percent. The authors conclude that, generally, arbitrators do not identify facets unique to arbitration in the schools. (Author/WD)

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SCHOOL ARBITRATION: WHAT THE ARBITRATORS ARE DOING

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EA 013 314

November 31, 1980

Introduction

This study is based upon arbitration decisions found in the Arbitration In The Schools series available from the American Arbitration Association. Appendix II contains a brief description of the background and methodology that was used.

Footnote citations generally are references to The Arbitration In the Schools series. Thus, a footnote reading 71 AIS 22 means, Report No. 71, Arbitration In The Schools, Case No. 22. The AIS cases are availabe in two forms: (1) A monthly summary of the decision and award, and (2) microform copies of the full text of the original decision and award written by the arbitrator. All references in the footnotes and the Award Indexes in Appendix II are based upon the complete text found on the microform copies of the full text of the original decision and award.

Acknowledgements

This study was funded, in part, by funds from the National Institute of Education, as administered by the Center for Educational Policy and Management, University of Oregon, and funded in part by support from the Law School, University of Oregon. Any opinions expressed herein do not necessarily reflect those of The National Institute of Education nor those of the University of Oregon.

The authors wish to thank those who provided the funds and support that made this study possible. In addition, the authors wish to thank the many individuals who were involved in various phases of the project. These persons are too numerous to fully identify, but they include Robert H. Mattson and Jane H. Arends, Center for Educational Policy and Management; Richard Surles, Law School Librarian, and the secretarial staffs of the Center for Educational Policy and Management and the Law School at the University of Oregon.

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Grievance Arbitration Defined

Grievance arbitration is a process whereby two parties voluntarily agree to resolve disputes arising under an existing collective bargaining agreement through the use of a neutral third party. Arbitration exists because of its inclusion the collective bargaining contract. It exists to the extent permitted by the agreement. It is a process whereby employers and employees can resolve disputes over such matters as leaves, transfer, evaluation, discipline, and the host of other topics which might be included in the contract. Arbitration is the product of the parties--union and school district--agreement to use one or more third party-neutrals to hear a presentation of the dispute and to rule upon it. In most situations, the ruling of the arbitrator will be final and binding. It will be binding because the parties agreed in their contract that it will be final and binding.

Grievance arbitration should be distinguished from several other related, dispute-resolution techniques, such as voluntary interest arbitration, compulsory arbitration, mediation, and fact finding. Interest arbitration is a process, often voluntarily agreed to by the parties, to empower a third power to complete writing the terms of a new contract when the parties cannot successfully negotiate the disputed terms of a new contract. Grievance arbitration is concerned with interpreting an existing contract, interest arbitration is concerned with completing a new contract. Another matter to distinguish from voluntary arbitration, either grievance or interest, is compulsory arbitration. Voluntary arbitration arises because the parties have agreed to it; compulsory arbitration arises because of legislative or judicial mandate. Fact-finding is another item to distinguish from grievance arbitratration. Fact-finding is most often associated with the negotiations process. Fact-finding involves a presentation to a third party who will issue a report which purports to identify the true facts in a dispute, as distinguished from the propaganda being used by the parties. Fact-finding is usually non-binding. Its value arises from whatever persuasiveness is found in the report when it is made available to the parties and public. A final matter to distinguish from voluntary arbitration is mediation. A mediator is a third party who seeks to help the parties resolve their differences involving the terms of a new contract. A mediator does not make findings of fact, does not make a final decision, and normally operates far from the bright lights of the media. Mediators, by using their special skills in interpersonal relationships and their special understanding of the situation, may be able to help the parties arrive at their own, mutually acceptable agreement. The subject of this study is only that of voluntary, final and binding grievance arbitration and not of these other, related techniques of dispute resolution.

Arbitration Hearing

Pre-Hearing Steps: Contracts create the agreement to use an arbitration hearing process. The process begins when some personnel incident occurs that gives rise to a grievance. The grievance is filed. Once the grievance is filed, it will be subject to whatever number of steps the contract provides for attempting to resolve the dispute before calling on the arbitrator. The process may be diagramed as follows:

Contract negotiated containing
grievance mechanism

↓

Incident occurs causing dispute

↓

Dispute falls within the definition
of "grievance"

↓

Grievance filed

↓

Grievance processed through
pre-arbital step

↓

Arbitration Hearing

↓

Award

Grievance arbitration is the final step in a multistep grievance process established in the contract. Two or more steps, of varying degrees of formality may preceed arbitration. Most disputes should be settled at these prearbitral steps. The basic procedure used in the prearbitral steps is bilateral negotiations. Commonly, the contract will provide that each time a grievance advances to the next higher step, new union and management representatives become involved. The interjection of new personalities is intended to bring fresh outlooks and higher levels of settlement authority which may facilitate resolution of the grievance. The focus of these materials is on the arbitral process, however, and not on the several steps which precede arbitration.

The Hearing: The arbitration hearing can be conducted in any manner agreed to by the parties. One of the more common formats is to follow the American Arbitration Association's (AAA) Voluntary Labor Arbitration Rules. This process includes some of the following procedures:

Filing the Grievance
↓
Appointment of Arbitrator
↓
Pre-hearing agreements
↓
Arbitration Hearings
↓
Issuance of Award

The hearing will proceed according to procedures agreed to in any pre-hearing agreements that were made, any agreements reached during the hearings process, and under the rulings of the arbitrator during the hearing. Among the prehearing agreements might be the following:

1. Request for or waiver of stenographic record.
2. Identification of persons permitted to attend hearing.
3. Agreement to or waiver of swearing of witnesses.
4. Order of proceedings (commonly grievant goes first).
5. Agreement on the introduction of exhibits (i.e., documents, written statements, etc.) and evidence.
6. Waiver of oral hearing.
7. Filing of or waiver of pre-hearing, hearing, or post-hearing briefs.
8. Time of award.
9. Sharing of expenses (commonly shared equally).
10. Award if settlement is reached during hearing.
11. Other matters mutually agreed upon.

At the hearing, the arbitrator presides and conducts the hearing. The parties' presentations may include items from the following lists:

1. Identification of relevant contract terms.
2. Written documents or exhibits.
3. Witnesses.
4. Written briefs.
5. Oral arguments by the parties' representatives.

In many cases, the grievant's representative will lead off, followed by the opposing party. A rebuttal statement may be permitted by the grievant's representative. Witnesses may be called to give oral testimony and are also subject to cross-examination by the opposing party. Written briefs may be used at the pre-hearing, hearing, or post-hearing stage. When the parties have finished, the arbitrator will close the hearing. The award will be made after the arbitrator has reviewed the presentations, the record (if any), the briefs (if any), and his or her notes. The arbitrator may, also, personally do research on the issues in the case. The award will be rendered, within time limits, based upon the evidence and the language of the contract. If agreed to by the parties, a common time limit is 30 days, or such further extension as may be agreed.

Evidence: The purpose of a hearing, such as an arbitration hearing, is to identify the facts. The facts are found in the evidence presented by the parties. The side with the better evidence, as applied under the contract, presumably wins. These commonplace notions are often forgotten in the emotional heat, procedural wrangling, and other problems of the grievance hearing. It takes evidence to win a case and the parties must insure that they have the evidence. A case can be lost, in essence, by default without proper evidence. The evidence may take the following forms:

1. Direct examination of the parties witnesses.
2. Cross-examination of opposing parties witnesses.
3. Introduction of documents and exhibits to prove the existence of such things as policies, past practices, personnel histories, etc.
4. Rebuttal of the opposing party's case.
5. Presentation of briefs on points of law and other arbitration decisions, and which organize the information.
6. Oral arguments to summarize and organize the party's position.

One side can fail to produce evidence when it fails to contradict the evidence of the other side. When one party shows the existence of a past practice and the other side fails to contradict the evidence, the party establishing the past practice may win the case.[1] If a credible witness testifies from first-hand observations, the opposing party may not be able to effectively contradict the testimony by using only second-hand evidence and by not presenting the available source of the hearsay.[2] Where a witness gives direct testimony for one side but is not subjected to cross-examination and no rebuttal evidence is offered by the opposing party, the result may be similar to a default by the opposing party.[3] Where a case raises multiple issues (e.g., seniority and loss of professional advantage), and the evidence goes only to one issue (seniority), the second issue may be lost by default.[4]

The failure to produce evidence can manifest itself in other ways. Requests for a specific type of award may be unsupported by the evidence presented in the case. Where a union requests a compensatory award, such as back pay, specific evidence to justify the award must be provided in arbitration.[5] A large amount of evidence on the record may be required where the union seeks a significant award such as reevaluation.[6] Another common example, where the arguments may be long and evidence may be short, is the school district's attempt to defend against an award by citing a "list of horribles" that could occur in the future if the union were to win the grievance.[7] Predictions of what might happen in the future are rarely convincing. Similarly, a grievance may be rejected, as being too premature and hypothetical, where the union is primarily speculating about the possible future impact of a school policy.[8] Arbitrators may reject these types of arguments as being unsupported by present facts. The arbitrator may state that if the event does occur, it can be grieved at that time.

Another type of failure of the evidence can occur where the parties present evidence that is not credible or fails to use the most credible source to prove a point. One arbitrator discusses the credibility of a witness as follows:

> Resolution of such conflicts depends largely on the credibility of the witnesses. It should be noted in passing that accepting one version over another does not imply that there was a deliberate effort by one witness to deceive. Memories are not equally accurate and positions taken tend to find support in unconscious rationalization and coloration.[9]

Another arbitrator discussed a more blatant credibility problem.

> In the first place, grievant contradicted himself, his union representative and documentary evidence on several occasions. When confronted with different versions reported by others of the same incident, grievant accused them of being "untruthful."
>
> In addition, grievant's demeanor and attitude on the witness stand were most damaging to his credibility. Grievant's continual insistance that he was right and everyone else wrong left me with the distinct impression of grievant as a headstrong young man who is unable to take without offense advice or constructive criticism.[10]

Evidence that is presented may seem less credible because it is not presented in arbitration by the best source of the information. A school board action based on a "well-known" policy, but one which is unwritten, may substantially weaken the board's case.[11] Not calling a key witness, who was present,[12] producing a copy but not the original text of the parties' bargaining history,[13] and not producing a contract made with a grievant which was the basis of the grievance,[14] can have a detrimental effect on the case of the party attempting to use that information.

Not all forms of evidence may be received by the arbitrator. Prehearing settlement offers and discussions should not be accepted as evidence at the arbitration hearing, as a matter of policy, in order to encourage voluntary settlement.[15] Arbitrators may reject evidence of criminal guilt established in a court of law even though it involves the same incident that is the subject of the grievance.[16] Where the parties have not presented all of the evidence that the arbitrator feels is necessary, the arbitrator may make requests for additional evidence from the parties or witnesses.[17]

A party's case should address two points: (1) proof of a contract violation, or the lack of violation; and (2) proof of the justification or the lack of justification for a particular award (e.g., reinstatement with backpay). A party may succeed in proving a contract violation, but fail to provide a justification and rationale for the particular award requested.

In sum, arbitration decisions are based on the evidence presented by the parties. Some parties lose their case in arbitration because of a lack of evidence. The decision to go to arbitration and the preparation of the case should consider both the evidence that a party has, as well as the evidence that a party does not have on all points.

Post-hearing Activities: A party should present its entire case at the arbitration hearing. Under AAA rules, the parties may elect to file post-hearing briefs. The use of post-hearing briefs makes the process more costly and time consuming for the parties. There is nothing in the arbitrators' awards studied here to indicate whether the post-hearing briefs perform a valuable function that outweighs their cost and the delay their preparation may cause. There is evidence that the parties may attempt to abuse the appropriate role played by the post-hearing briefs. Their role should be to summarize, clarify, and organize what has been presented at the hearing. Arbitrators reject efforts, in the post-hearing briefs, to increase the remedies sought[18] and to raise new issues.[19] Raising new arguments at the post-hearing stage is not welcomed.[20] Only rarely, and even then only under severe restrictions can new evidence be offered after the hearing has closed.[21] Usually, new evidence, offered after the hearing has closed, is rejected. The reasons for the rejection include the fact that cross-examination cannot then be conducted, that the evidence would not affect the outcome of the case, even if it was accepted, or because it was reasonably available to the person offering the evidence during the hearing.[22] The policy behind such decisions is that it is desirable for the parties to be fully prepared, at the time of the hearing. Furthermore, the goal of voluntary settlement is enhanced if the parties do not wait until the last moment (post-hearing) to fully consider their cases.

Role of the Contract

In grievance arbitration, the contract plays the central role. One arbitrator states the matter as follows:

> The primary responsibility of the Arbitrator is to determine the intent of the parties - to find out what was meant by the contract language that the Parties themselves agreed to use and to be mutually bound by.[23]

Another states it in the following way:

> If the Collective Bargaining Agreement is to have any validity and any credibility, the Arbitrator must adhere to the language of the Agreement, even though he may not personally agree with.[24]

Grievance arbitration is thus seen as a process of contract interpretation that is binding upon the parties, by virtue of their agreement. While the contract is the central focus, it may be that the contract is ambiguous or otherwise unclear. The arbitrator must attempt to define what the unclear language means. In doing this, the arbitrator will treat the contract as a practical working document rather than a technical legal document,[25] and attempt to ascertain the intent of parties.

Clauses: The contract serves as the substantive basis from which the dispute must be resolved. In addition, the contract is the basis of the arbitrator's power and authority. A number of clauses of the contract must be examined in order to determine the proper role of the arbitrator. These clauses might include the following:

1. Definition clause that defines grievance and grievant.
2. Grievance procedure clause.
3. The recognition clause defines who is in the collective bargaining unit.

4. Any clause which gives an explicit limit on the authority to make awards.
5. Any clause having an implicit limitation, such as the management rights clause.
6. The substantive clauses in issue which may have explicit or implicit limitations.
7. Any clauses with time restrictions which might affect arbitration.

In a given dispute, it may be necessary to review almost the entire contract in order to identify all items which may relate to the particular dispute, and to the power of the arbitrator.

Grievance and Grievant

One of the clauses in the definition section of the contract will define the scope of the disputes which constitute grievances. The definition may be broad or narrow, but only matters coming within the definition will be subject to the grievance and arbitration mechanism. The definition may cover "any dispute arising under the contract," thus limiting a grievance to matters within the scope of the agreement. The definition may cover "any dispute whatsoever, of any nature" between the employer and the employee or union. This latter definition is very broad, including matters within its scope that may go beyond the substantive provisions of the contract itself. In addition, the grievant (the person entitled to file a defined grievance) may be specifically identified by the contract. Commonly, an employee or teacher is defined as a grievant. The union may or may not be named grievant. If not, a dispute may arise over whether the union can file a grievance in its own name when no individual teacher or other employee has filed a grievance, or when the teacher has left the school.[26] In one such dispute where a teacher had waived the teacher's right to file a grievance, but the union had no knowledge of the waiver, an arbitrator made the following statement about the provision allowing the union to file a grievance in its own right:

> I construe this as manifesting an intent to empower the Federation to policy the Contract in the interest of the bargaining unit as a whole even in a case where the individual teacher hurt by the breach of contract is unwilling for some reason to participate in the processing of the grievance.[27]

Where there is a question whether a particular grievant employee is entitled to file a grievance (i.e., is one of the class of named grievants, such as "teacher"), arbitrators will commonly look to the scope of the recognition clause in the contract.[28] The school district may be named in the contract as a possible grievant, although this is fairly rare.[29] If it is not, the employer school may have to take the action it desires and leave it to the teachers to file the grievance.

Representation of the Parties

Labor relations is a process which is conducted, in the main, by non-lawyers. However, lawyers may play many roles in addition to their appearances before courts or labor boards. Under the rules of AAA, a party may be represented by counsel or by other authorized representatives. In this study, 305 of the more recent cases in the sample were reviewed to determine what role, if any, lawyers played. In almost 60 percent of the cases, attorneys were involved on behalf of one or both parties to the action. In the remaining 40 percent of the cases the arbitrators did not indicate whether attorneys were being used by the parties. The school district is the most likely party to use a lawyer. They used lawyers in 56 percent or 172 cases out of the 305 cases examined. Grievants were frequently represented by union personnel such as Unisev-reps. Grievants were represented by attorneys in only 21 percent of the cases.

The presence or absence of a lawyer in the arbitral process appears to have little direct effect on the party's chances of winning a grievance. While grievants were represented by attorneys in only 21 percent of the cases they, nevertheless, won 55 percent of the awards in the sample. While school districts used attorneys in 56 percent of the cases, they won only 42 percent of the awards. The chances of attorneys being used by grievants increases when the grievance is a class action. Seventy-three percent of the class or group grievances had an attorney on one or both sides of the case.

Commonly, the individual grievant is represented by the union, rather than being permitted to present the grievance individually. If the union is unwilling to pursue the grievance, the grievant has little or no chance to get the matter arbitrated.[30] In rare situations, however, grievants might be permitted to participate in the grievance hearing by being represented by their own attorney, separate and apart from the union.[31] The union's decision not to represent a grievant must be made in good faith.

Selection and Role of the Arbitrator

The arbitrator can be any person or panel (i.e., three or more persons) upon whom the parties can mutually agree. The arbitrator may or may not have prior experience in the field. Lists of names of potential arbitrators might be obtained from state or local labor boards or agencies, the American Arbitration Association (AAA), or the Federal Mediation and Conciliation Service.

Code of Ethics: The National Academy of Arbitrators has promulgated a Code of Professional Responsibility for arbitrators of labor-management disputes which covers some arbitrators. The Code is a useful reference for the parties, to help them understand what might be expected from the arbitrator of their choice. Under the Code and the rules of AAA, the burden is on the proposed arbitrators to disclose any circumstances that might disqualify them from being neutral or impartial. This includes such matters as personal relationships, financial interests, or other conflicts of interest. The arbitrator should generally treat all matters as confidential, unless the parties indicate otherwise. The arbitrator should engage in an "arms-length" relationship with the parties and avoid *ex parte* contacts with one party in the absence of the other party. The arbitrator should perform all functions in a timely manner, including the issuance of the award. Finally, the arbitrator should provide a fair, adequate, and impartial hearing.

Selection Methods: The most common procedure in school arbitration is to use a single arbitrator picked for the particular grievance, the so-called *ad hoc* arbitrator. One alternative to this is to use a panel of three (or more) arbitrators. Both the single arbitrator or the panel of arbitrators are usually selected by the parties. Commonly, both parties to the grievance receive identical lists of names of potential arbitrators from a supplier, such as the American Arbitration Association or a state labor agency. The parties cross out the unacceptable candidates as they go down the lists of names until they reach a person upon whom they can agree. This striking-of-names technique may require several lists in extreme situations. Where a panel is used, commonly each side separately appoints a person of their choice to represent them, and then the parties mutually agree on the third member of the panel. The third member is usually the only true neutral. The result of using a panel is that a 2-1 split in the decision can be expected. One advantage of the panel is to give each side a representative of emphasize their position in the private deliberations with the neutral. The disadvantages include extra cost due for the additional decision makers. Panels are rarely used in school arbitrations. Less than 3 percent of the cases studied involved a panel of arbitrators. In virtually all cases, the parties appear to be able to voluntarily agree on an arbitrator. If the parties cannot agree on an arbitrator, an agency, like AAA, to whom the parties have granted jurisdiction, might appoint the arbitrator.

Authority of Arbitrator: Once selected, arbitrators exercise those powers given to them by the parties through the contract or other agreements. In the usual case, the arbitrator is empowered to make a final and binding decision. In a realitively small number of cases, about 5 percent of the cases studied, the arbitrator may be empowered to give only a non-binding, advisory award. An advisory award is a recommendation which the parties can individually accept or reject. Where an arbitrator is given only advisory authority, however, it is a mistake to assume that the advisory award has no effect. Where, for example, a school district employer has denied a leave to a teacher and the arbitrator renders an advisory award which finds no contract violation, the "advisory award" may be, practically speaking, as final and effectively binding as any non-advisory award.

Where an arbitrator has final and binding authority, the arbitrator may also make some non-binding "recommendations" or "suggestions" on various matters, in addition the binding award on the specific grievance. Even where an arbitrator has the authority to issue a binding decision, the arbitrator may declare whether or not the contract was violated. In such a case, there may be no actual damage to any teacher or other employee, and no compensatory award is warranted.[33]

The major function of the arbitrator is to issue an award which will settle a specific grievance within the terms of the contract. Arbitrators, however, may see their role as going beyond that function, and indeed, may see a need for going beyond the facts of a particular grievance in making an award. Arbitrators may see a need for a decision which, hopefully, will improve the overall relationship of the parties, in addition to settling the immediate dispute. One arbitrator stated the matter in this way:

> It is therefore advisable that an Arbitrator making a decision involving such a relationship inform himself as fully as possible both in regard to the meaning of the Agreement the parties have made, and as to the probable effect of any decision based upon the contractual agreement at issue.[34]

Another arbitrator notes that "it has a potential for problem-solving beyond the limited capacities of other forums."[35] The parties will not maximize the value of the arbitral process if they merely treat it as a substitute for a judicial proceeding. Indeed, by using the narrow approaches often used by lawyers, in the judicial process, the parties may well find themselves unpleasantly surprised and ill-prepared. For example, basing ones' arguments solely on the literal interpretation of contract language, or opposing an award on similar grounds may result in a party's losing preliminary motions and increase the chances of losing a close case. "Equity" and not "the law" is the approach used by many arbitrators.

Related to the broad perspective taken by many arbitrators, is the role of advisor taken by some. Where, for example, a school district wins on the basis of contract interpretation, the arbitrator may still advise the school district to take a less restrictive view than its legal rights permit. One of the better statements of this occurred when a grievant teacher lost a grievance based upon his transfer. The arbitrator, nevertheless, said:

> When considered in the light of what is best for the children, the District makes a mistake when it assigns (grievant)...to work with elementary school students instead of secondary school students where he has spent his life as a teacher. Standing on the right to do it under the Agreement does not make it right for the kids, for the (grievant)..., or for quality education in the District.[36]

A delicate role an arbitrator plays on rare occasions is to mediate a settlement prior to the award. The role is delicate because if mediation fails, particularly where the arbitration has suggested a solution, the parties may no longer view the arbitrator as a true neutral.. Under the Code of Professional Responsibility for Arbitrators, mediation is warranted only upon the mutual request of the parties. In sum, when the union and the school district agree to the arbitration device, the parties are well advised to prepare for a review that goes beyond their narrow, literal, contractual rights.

Arbitration Decision and Award

Format: The format of the dcision used by the arbitrator is, in part, a reflection of the arbitrator's own style. There is no prescribed format that must be followed. There are, however, a number of commonly used elements, all or part of which the arbitrator may use. The elements include the following:

1. Title of case (identification of parties)
2. Identification of arbitrator
3. Appearances at the hearing:
   a. for union - names and position
   b. for school district - names and position
4. Date and location of hearing.
5. Important dates for the grievance:
   a. filing date
   b. date of submission
   c. date of filing briefs, if any
6. Preliminary motions and objections, if any.
7. Summary statement of issue.
8. Background to grievance, if relevant.
9. Copy of relevant contract provisions.
10. Facts of the case.
11. Summary of arguments presented by school district.
12. Summary of arguments presented by union.
13. Statement by the arbitrator indicating his or her full review of oral and written evidence and of the procedural rights accorded the parties (e.g., cross-examination, presentation of witnesses, etc.).
14. Arbitrator's discussion of the issues.
15. Statement of the award.
16. Signature of arbitrator.

A common type of heading for an arbitration award combines the title of the case and the name of the arbitrator and looks much like the following:

In the Matter of Arbitration
Between
Blank Education Association
-and-
Blank School District No. 13
Anywhere, Oregon

Arbitration
Opinion and Award

I.M. Able
Arbitrator

The total length of the decision commonly runs from a minimum of 3-4 typed pages to a maximum of 20-30 typed pages. The longest parts of the decision are usually the summary of the arguments of both sides and the copy of the contract clauses.

Time Frame of Decision-Making: One of the advantages of arbitration, over other forms of dispute resolution, is its relative speed. However, the process can be lengthy, even in the best of circumstances. A number of events may occur before the matter is finally subject to the arbitrator's award. Some of these events include the following:

1. Action triggering dispute.
2. Filing of grievance.
3. Processing grievance through pre-arbitral steps.
4. Decision to arbitrate.
5. Selection of arbitrator.
6. Scheduling of hearing to meet needs of parties and arbitrator.
7. Pre-hearing conference, briefs, if any.
8. Conduct of arbitration hearing.
9. Filing of post-hearing briefs, if any.
10. Study time and writing time of arbitrator.
11. Delivery of award and decision.

The arbitration hearing itself commonly lasts for one or two days, although some cases, in the study, lasted as long as seven days. In multi-day hearings, the hearing normally continues on consecutive days, although in some instances there are breaks between the hearing days.

The time between the filing of a grievance and the arbitration hearing averages 6 to 8 months, and may be as short as one month in some cases or may be longer than a year in other instances. Presumably, during this time the parties are attempting to resolve the dispute through the prearbitral steps in the grievance process. The time period between the incident giving rise to the grievance and the filing of the grievance is commonly quite short. However, in the case of "continuing grievances," the incidents may have started a year or more before the grievance is filed. The contract may attempt to limit the time within which a grievance must be filed. The time between the arbitration hearing and the arbitration award commonly ranges from one or one and a half to two months. Part of this time may be consumed by the parties in the preparation and filing of post-hearing briefs. In summary, the total time between the filing of the grievance and the rendering of the arbitrator's decision is commonly seven to ten months, or almost a school year. One of the claimed virtues of arbitration is its relative speed in decision-making. Given the usual nine-month school calendar, it is obvious that a large number of grievances will not be resolved by the arbitral process within the same school year in which the grievance is filed.

One device that the American Arbitration Association (AAA) has proposed to speed up the arbitration process and to reduce costs is the Expedited Labor Arbitration Rules. In only about 1 percent of the cases studied was there any indication that the parties used expedited arbitration. Under the expedited rules, the arbitrator is appointed directly by AAA, no stenographic record is maintained, the hearing is usually finished in one day, post-hearing briefs are not used, the award is normally made within five days, and there is either no opinion or only a summary opinion. The decision to use expedited procedures is one for the parties.

Another way in which the parties can reduce costs and save time is by waiving some of their procedural rights or by stipulating to various items. Waivers include waiving the hearing (allowing the arbitrator to decide on the basis of written submissions), waiving cross-examination, waiving the use of a record, or waiving the use of briefs. Less than 5 percent of the cases studied indicated the use of waivers. Stipulations include stipulations of the issue, of certain facts, or the admissibility of certain evidence. Less than 5 percent of the cases studied involved a stipulation of some variety.

In most situations, the parties can agree on what issue the arbitrator must decide. Nevertheless, in a small number of the cases studied, the parties could not mutually agree on the description of the dispute and the arbitrator had to define the exact issue before deciding the case. When the parties cannot agree on the statement of the issue, it seems clear that no settlement can be reached short of arbitration. In a number of these cases, the reader is left wondering about the overall relationship between the parties.

The school calendar can have an important impact on the nature of the arbitrator's award. In most cases, a grievance takes almost a school year to be decided. There are ways in which the parties can attempt to reduce this time. However, in most of the cases studied, the parties did not choose to take the quicker route.

The Award: The award is the muscle of the arbitration process. It requires employer-schools to do something or tells grievants-teachers their request is denied. The award, literally and figuratively, is the bottom line of the process. In making an award, arbirators view their role as somewhat limited.

> What arbitrators are not charged to do, however, is to rewrite and modify the agreement by fashioning solutions to problems in contract interpretation by drawing them "from thin air."[37]
>
> * * *
>
> An arbitrator does not sit as a kind of private judge ruling on general questions of equity, or dispensing solutions to all questions of fairness in a case.

Another arbitrator states simply: "My duty is to fashion an award that draws its essence from the contract."[38]

This language of limitation, however, must be read in the light of other statements. Other language suggests where there is a contract right, there must be a contract remedy. One arbitrator states:

> It is generally recognized that the parties, by submitting their dispute to the arbitrator, have empowered him to devise adequate remedies...[39]

Another states:

> It is also well established in the area of arbitration law that Arbitrators, absent contractual language in the contract to the contrary, can fashion an award designed to compel performance of the contractual language.[40]

Of course, in order to receive a specific award, the language of the contract must permit it and the facts must support it.[41] In addition, the pleadings on the grievance must contain a request for the award.[42] A party should not wait until the arbitration hearing, or worse yet, the filling of post-hearing briefs, before raising the issue of the specific award requested. An efficient procedural device might be to stipulate, at the outset of the hearing, what the remedy will be, dependent, of course, upon the outcome of the case.[43]

Scope of the Award: An important issue in arbitration is the scope of the arbitrator's award. This problem is seen in different ways. The employer school may be unwilling, during negotiations, to agree to an arbitration provision for fear of losing managerial control. The judicial system may be reluctant to accept an arbitrator's decision because some fear it involves an illegal delegation of the authority entrusted to a public agency and now bestowed on a private person (the arbitrator). The teacher's union may feel that they can get awards from an arbitrator that they could not get at the negotiations table. Whether any of these views are seen as correct probably lies more in the eyes of the beholder than in the nature of the awards themselves. Arbitrators give no appearance of being reckless in their awards.

Generally, arbitrators will not issue awards on matters that may occur in the future. Described another way, they will not issue injunctions which are contingent upon future events. One arbitrator states the following:

> I have answered the question affirmatively, but I may not go beyond that by rendering an award on issues that have not formally been submitted to me or by prospectively ordering the Board to cease and desist from promulgating guidelines that may not violate the contract.[44]

Another arbitrator states:

> Although it is possible, expecially by mutual agreement between the parties, to file a grievance to determine the validity under a collective bargaining agreement, of an intended action...such an arbitration proceeding would be requesting the arbitrator to in fact grant injunctive relief. Many authorities are of the opinion that an arbitrator may not grant injunctive relief without express authority from the parties.[45] (Emphasis added.)

One of the advantages of arbitration over other forms of dispute resolution is that the arbitrator commonly has great flexibility to create an award appropriate for a particular situation. The list of possibilities is a long one.

1. Money awards:

The arbitrator's award clearly can include a monetary award.

An award of damages is appropriate to the extent the amount makes the injured party whole.[46] Payment of interest is generally denied.[47] Punitive damages are rarely, if ever, awarded.[48] Provisions in the contract may limit the authority of the arbitrator to make monetary awards, such as a provision which precludes expenditure of funds not allocated in the budget (i.e., no line items).[49] Monetary awards are commonly given for lost work, such as pay for promised days which were later cancelled,[50] for positions wrongfully denied,[51] or for the improper assignment of extra duties.[52]

2. Personnel changes:

The arbitrator's award may be the reassignment, reinstatement, or transfer of teachers, where the school has acted unlawfully under the contract. Where a transfer has occurred, in violation of the contract, the award may require the teacher transferred back to the original position.[53] A transfer award may be delayed to minimize disruption during the school year.[54] If the transfer is impractical, for example, because of the school calendar, then the grievant may be given an opportunity to transfer the following year.[55] Where the contract does not give the arbitrator the power to make transfers, the award may require the school to give "consideration" to the request in a following year.[56]

An improperly released teacher may be reinstated. This frequently occurs during the last year of the teacher's probationary period. The arbitrator may award an additional probationary year in some circumstances.[57] Reinstatement may be awarded, but delayed until the beginning of a new school term.[58] In other circumstances, recall rights under the contract may be awarded.[59] There is little evidence that an arbitrator will actually award a promotion.[60]

3. Leave determination:

Leave questions are often the subject of arbitration. The arbitrator is commonly called upon to construe the breadth of the leave clause. In those cases, the awards will frequently answer substantive issues, such as, whether the leave should be granted, or whether the leave should be paid or unpaid.[61]

4. Evaluations:

A teacher's personnel file is an important collection of evaluations and other documents. An arbitrator's award may add items to or delete items from this file. Where the school district has acted improperly, and the action is reflected in the personnel file, the arbitrator may rule in some cases that those references be removed.[62] If material was improperly removed from the file by the school, the arbitrator may award that it be returned.[63] It is not clear that the arbitrator can require school personnel to create favorable documents to be added to the file.[64] However, the arbitrator can award that the arbitration decision become a part of the personnel file, or that the grievant be given an opportunity to add rebutal statements.[65] Similarly, the arbitrator may reduce a suspension or probationary period that was improperly imposed, for example, one that was too harsh.[66]

Arbitrators are keenly aware of their own limitations. Arbitrators are reluctant to require major actions such as schedule changes. This reluctance increases, as suggested earlier, as the number of days remaining in a school term decreases. Where the school district wrongfully refused to schedule make-up days and the school year was over by the time of arbitration, the arbitrator required payment to the teachers but did not require the district to reopen the schools.[67] Where extra duties are assigned improperly, but the school term is closing, the arbitrator may order that the present assignment, nevertheless, be continued,[68] or the school may be given a period of time to readjust the schedule, even though the effect is to prolong a contract violation.[69] The arbitrator will seek to enforce the contract but will not seek to make judgmental decisions about what schedule is "best." One arbitrator stated"

> In the instant case much evidence was adduced with respect to the advantages of the different lunch hour programs. It is not...for the undersigned to evaluate the educational benefits of one plan as opposed to the other...[C]hoosing among alternative solutions should not be removed from their capable hands and put in those of the arbitrator...[70]

Going Beyond the Award: The center of focus in the award is usually the decision to dismiss the grievance or to make the grievant whole. However, another goal of the arbitrator is to promote the relationship of the parties. This may manifest itself in different ways. One arbitrator stated the goal in this way:

> My approach to the task of interpreting a collective bargaining agreement is that such a document is a guide to an ongoing relationship and should be interpreted with a view towards enhancing a future harmonious relationship between the parties rather than that it be interpreted in a strictly legal manner as is done with a purchase and sale business agreement.[71]

Thus, in a case, where the arbitrator ruled in favor of the teachers, the award did not include the Union's request for a letter of apology to each member of the bargaining unit because it would be detrimental to the parties' relationship.[72] Another manifestation of this approach is a situation where the arbitrator makes the award, but then admonishes the winner not to view it as a broad license.[73]

Another way arbitrators attempt to foster a better relationship between the parties may be to deny the grievance, but then "recommend" that a more lenient view be taken in the future. Thus, the school may be "encouraged" to offer a teaching contract, remove a letter of reprimand, or pay a certain sum.[74] The effectiveness of these recommendations is unknown.

Related Matters: An issue which may arise during the arbitration hearing is the legality of certain awards. The question may be raised by the schools and, at times, the union, in an effort to convince the arbitrator not to make an award against them. A variation on this defense tactic is to attempt to list all of the horrible things that may happen as a result of issuing a certain type of award. There is little evidence that such tactics are effective. One arbitrator stated the following:

> The legality of relief granted or withheld is subject to challenge in the appropriate Courts. However, the mere possibility that improper relief might be granted is no logical basis upon which to preclude evaluation of substantive claims; otherwise, all grievances would be subject to the identical defect...[N]o presumption can be justly made than an award contrary to law will be issued.[75]

Another arbitrator answered the matter in the following fashion:

> The suggestion that the logical extension of a denial of this grievance would permit additional subcontracting...is not well founded. First, if there was any additional subcontracting...this matter could be subject to the grievance procedure...[s]econdly, the parties do have the opportunity to bargain additional contract provisions...[76]

A common element in the awards is the role of good faith on the part of the losing party, commonly, it is the good faith of the school district. A school district, for example, that loses a grievance, but acted in good faith, may benefit by a less harsh award.[77] The less harsh award may be a reduced monetary award, refusal to require the payment of interest, or a refusal to make the award retroactive.[78]

Advisory awards do not play a large role in school arbitration, absent a request by the parties.[79] It may be felt by some that the advisory award means little because it does not compel either side to do anything. Others argue, as does one arbitrator, that "the mere right to arbitration, if not the arbitration itself has a settling effect on both sides of the table."[80] A similar impact may result in a number of non-advisory cases. Some awards may simply be a finding that the contract was or was not violated, and nothing of a compensatory nature is granted. One arbitrator stated the following:

> There are fairly frequent occasions when some action is found to be violative of the contract, but where no employee was actually damaged thereby and no compensatory award is issued.[81]

In other cases, the lateness of the award within the school calendar[82] or the term of the contract[83] precludes a compensatory award.

Related to the non-compensatory award is the award requiring or recommending that the parties negotiate a solution to the problem. This may result from a lack of authority on the part of the arbitrator to award more,[84] the lack of individual damage,[85] or because it appears to be the most viable choice in the circumstances.[86] Where the arbitrator recommends that the parties attempt to negotiate a solution, the arbitrator may retain jurisdiction so that if the negotiations fail, the arbitrator will rule on the matter. As one arbitrator stated:

> In informal arbitration hearings when a stenographic reporter is not present to make a complete formal record, it frequently is most convenient to argue the disputed questions of contract interpretation and postpone the question of specific damages. Frequently, the parties work out the specific details. In the event they cannot do so, the matter of damages is returned to the Arbitrator for decision after a further hearing.[87]

Other awards require consideration of the issue of mitigation. This issue may come up as a damages issue, namely whether the winning grievant did what he or she could to mitigate the amount of the damages. One arbitrator states the matter as follows:

> This, however, did not relieve her or her legal obligation to minimize damages by making a concerted effort to find a new job. Although she registered at the Union hiring hall for work, in view of her admission that she really did not look for a new job...she did not, in the Arbitrator's view, make a serious effort to find work. She is not entitled to full back pay.[88]

Another way in which the issue may arise is in discipline cases. In those situations the arbitrator may first determine that the school district was correct in imposing discipline, but then review the nature of the discipline to determine if it was proper. If there are mitigating circumstances, the quantity or severity of the discipline might be diminished.[89]

Sample Awards: The following are four examples of how an award may be made. They are provided to familiarize the reader with the language commonly used in arbitration decisions.

AWARD 1

The grievance of G.A. Scholar is allowed. He shall be reinstated in the same or similar position, as soon as practicable, with full seniority and professional advantages. He shall be compensated for all wages or salaries lost from the end of the last school year until the date of his reinstatement, less any earnings he may have had during such period. Jurisdiction is retained to resolve any disputes which might arise in the implementation of this award.

Date

I.M. Able, Arbitrator

* * *

AWARD 2

The grievance is denied.

Date

I.M. Able, Arbitrator

* * *

AWARD 3

The grievance with respect to the alleged violations of Article 4, Section M - Non-Harassment, and Article 19 - Personal Freedom, Article 7 - Rights of Professional Employees, Section B, Criticism of Teachers, are hereby denied.

The Arbitrator finds the "special" evaluation and the memo to be disciplinary warnings; the charges in those disciplinary warnings are not sustained by the evidence; nor were these disciplinary warnings imposed in a fair and just manner. In imposing these two disciplinary warnings, the District violated Article 6, Section D of the Master Agreement.

The District is hereby ordered to remove these two disciplinary warnings from the grievant's personnel file within ten (10) days of receipt of this award.

Date

I.M. Able, Arbitrator

* * *

AWARD 4

The District did not violate Article 9, Section C(3) of the contract by requiring specific reasons before approving grievants' applications for personal business leave. The contract, however, does not authorize the District to determine the amount of time required to perform the personal business. When the activity qualified for personal business leave, the contract provides one day to accomplish the business. The agreement permits the District to require a written application to be filed at least three days before the leave occurs. The application shall include reasons sufficiently specific to allow the District to determine that the business cannot be accomplished except during school hours. The grievance is denied. The arbitrator retains jurisdiction of this matter for ten days following the date of this award.

____________ Date

________________________ I.M. Able, Arbitrator

The Opinion: In order to settle the dispute, an award must be made to one or the other of the parties. As indicated above, this is commonly done in a few sentences or a paragraph. Accompanying the award, in many cases, is the arbitrator's opinion. This is a discussion of how the arbitrator determined what the actual facts were and then correlated the facts with the contract. The opinion shows the reasoning process used by the arbitrator. In ways, the opinion may be of greater long-term significance to the parties than the award. It tells them how the arbitrator views an issue and how the arbitrator views their relationship. An award may be more acceptable, to both parties, when it is the product of a well-reasoned decision that is logically and clearly explained. The opinion can also be used in the future to help decide whether that arbitrator should be selected for subsequent cases. The way in which the opinion is written gives clues to whether it has value as a precedent in future cases. In sum, one of the hallmarks of better arbitrators is the manner in which they write their opinions.

Before the Award: Up to this point, arbitration has been discussed as though it were a dispute resolution process that otherwise does not effect the parties' conduct. In reality, the adoption of an arbitration system may itself have a significant impact on the relationship of the parties, even in the absence of arbitration hearings. The parties may wish to conduct their relationship in such a manner as to maximize their chances of winning in the event of a future dispute. This has implications for both school management and teachers.

It is indisputable that arbitration looks primarily to the contract. It is arguable, however, that in a number of circumstances, the school employer is held not only to the specific standard of conduct required by the contract, but is also held to a general standard of good faith or reasonable conduct. One area in which arbitrators require "good faith" or "reasonableness" by the parties, regardless of contractual language, is in the granting of awards. Where a union seeks damages, and it has been determined that the school district violated the contract, damages are commonly denied where the school district acted reasonably, in good faith, or without hostility.[90] In some cases, even where the arbitrator rules against the grievant teacher and in favor of the school, the arbitrator may go on to review the matter to determine if there is evidence of hostility or bad faith on the part of the school.[91] Where a school district is given "sole" authority to determine some question, the arbitrator may not interpret that to mean the school district can do anything it wants. Rather, the school district may be required to exercise its discretion in a reasonable manner.[92] Where the contract is silent on a matter, a superintendent has been obligated to exercise personal judgment in as reasonable and effective a manner.[93] One arbitrator summed it up very succinctly by stating:

> Reasonableness is an unarticulated major premise underpinning every provision of the Agreement.[94]

When the union and the school district agree to an arbitration provision, they may be buying a package that contains something more than what appears on the face of a contract. If "reasonableness" or "good faith" is an implied term of the contract, school districts may wish to review the grievance from that point of view before deciding whether to settle at a preliminary step or to push the grievance to arbitration. It would be useful for the union to also review the matter before expecting an arbitrator to make substantial monetary awards. The point is not that every arbitrator in every case will or must use the Reasonableness" or "good faith" test. The point is that it is a standard which has been used in a number of cases. It may be useful for the parties to consider both their conduct and their arguments in pre-arbitral settlement efforts and in arbitration and consider their actions in light of the possible use of such a standard by the arbitrator. Where such a standard is implied in the agreement, it use may be more profoundly important than many of the explicit clauses found in the contract.

It has been suggested that one of the more important impacts of the arbitration process is to imply the use of a reasonableness standard. The requirement of reasonableness may affect the school district more directly than it affects what the teachers do. Teachers should not be misled into thinking, however, that an agreement to use the arbitration process to resolve disputes imposes no special obligations on them. There may also be implied terms that affect their actions.

By accepting a union, teachers like other employees, may lose some individual rights. Under the public sector statute, the union normally becomes the "exclusive" representative.[95] The union, and not individual teachers, negotiate the contract to which the union is the signatory. Individual contracts may no longer be effective.[96] The teacher may be initially bound by the contract. Arbitrators apply the "work-now, grieve-later" rule in school arbitrations as they do elsewhere. Under this rule, a teacher must follow a disputed order from the school administrator or suffer the consequences of insubordination. If the teacher believes that order violates the teacher's contractual rights, he or she still must obey (work now), and can file a grievance at a later time. As one arbitrator stated the matter:

> There is a long consistent line of decisions by arbitrators... that any claim of agreement violation by an employer's direction to an employee must be submitted to the procedure established by the agreement for determination and possible redress, that an employee may not engage in self-help by refusing to comply with such direction...and that, if he does so, he is insubordinate...[97]

The "work-now, grieve-later" rule is rarely found written into contracts, but is common in arbitration.

A teacher who does file a grievance and who wins, may still be denied full remedy, where that teacher acted unreasonably or was otherwise at "fault." The arbitrator may order reinstatement if the dismissal were improper, but may deny backpay to a teacher who is also at fault.[98] Where a grievance mechanism exists, a teacher may be required to use it rather than attempt to overcome a poor evaluation by claiming, after the evaluation, that the poor job resulted from having to use inadequate teaching materials.[99]

A teacher cannot, in some instances, claim ignorance of the proper contractual procedures when the teacher seeks to file a tardy claim. One arbitrator stated:

> It seems reasonable for the principal to assume that this employee, an educated person and long-time teacher, would be familiar with the terms and conditions of her employment.[100]

In summary, the contract contains a statement of teacher rights and responsibilities. The teacher who claims ignorance of the contractual scheme may lose because of the ignorance. Similarly, most contracts contain some type of grievance mechanism. If a teacher with a grievance fails to use the mechanism, the teacher may have to later pay a price for that failure. Just as the school employer may be held to a standard of reasonableness in carrying out employer responsibilities, the teacher may also be held to a related version of the standard reasonableness.

After the Award: The arbitrator bases the award upon the contract. Where the contract is limited in scope or the contract limits the arbitrator's authority, the award may settle one issue, but leave other aspects of the dispute untouched. The role of arbitrators is to settle a specific grievance under the limited authority given to them. They may supervise the entire relationship. After the award, one of the parties may feel that they are left in an undesirable position. For example, a discharged teacher may be awarded reinstatement causing problems for the school, or a planned curtailment may be prohibited despite budgetary pressures, or teachers may be required to give detailed explanations in personal leave requests for the first time. To avoid the undesirable effects of other awards in the future, the parties may need to negotiate new provisions in the contract to cover the situation. The negotiations, of course, must be between the school district and the union, and not between the school district and individual teachers. The union is the statutorily recognized exclusive bargaining representative. Through mutual consent, the parties may agree to negotiate during the term of the unexpired contract. In the absence of mutual consent, a party may unilaterally raise the issue during negotiations for a new contract, after the expiration of the prior agreement. The award should be carefully scrutinized to determine what type of language will be needed in the contract to avoid the problem in the future. The arbitration award may not be the end of the overall problem. The parties may have to negotiate to clear up other aspects of the overall problem or to avoid repetition of the matter in the future. The parties may also have to negotiate in order to fully implement a broad award.

It should also be noted that invoking the arbitration process is not a one-way street. Once the parties begin the arbitration process, they may reevaluate their positions and find them less strong than had been earlier thought. Once the arbitration process has started, the parties may see that, under the language of the contract, any arbitration award is likely to be unsatisfactory. The rules of the AAA specifically provide for the possibility of the parties reaching a settlement prior to the announcement of the arbitrator's award. If such a settlement is reached, the parties may mutually agree to terminate the hearings without an award, or the parties may mutually request that the arbitrator set forth the terms of the agreed settlement in the form of an award. Such an award, by the terms of the contract, would be final and binding.

Footnotes

1. 103 AIS 16. See also 105 AIS 1; 49 AIS D-7.
2. 89 AIS 4.
3. 97 AIS 11.
4. 62 AIS 17.
5. 92 AIS 9; 67 AIS 5.
6. 99 AIS 12.
7. 79 AIS 16; AIS 9; AIS 4.
8. 84 AIS 16; 83 AIS 8; 63 AIS 12; 51 AIS K-16.
9. 62 AIS 10. See also 94 AIS 18.
10. 110 AIS 8. See also 69 AIS 1.
11. 79 AIS 16; 58 AIS X-11.
12. 61 AIS 6.
13. 75 AIS 12.
14. 64 AIS 18. See also 89 AIS 22.
15. 59 AIS 9.
16. 88 AIS 22.
17. E.g., 88 AIS 12.
18. 84 AIS 20.
19. 108 AIS 16; 106 AIS 19; 98 AIS 7.
20. 107 AIS 11; 54 AIS L-2.
21. 110 AIS 1; 91 AIS 13.
22. 99 AIS 22; 91 AIS 13; AIS 22; 80 AIS 6.
23. 106 AIS 19.
24. 97 AIS 4.
25. 110 AIS 15.

26. E.g., in 83 AIS 10, teacher-grievant left the state, but the union was deemed to stand in the shoes of the grievant. In 88 AIS 15, the union could grieve for a teacher where the teacher has so authorized the union by letter.

27. 101 AIS 2.

28. E.g., 83 AIS 9.

29. E.g., 56 AIS A-13, school board initiated grievance.

30. E.g., 86 AIS 4.

31. 109 AIS 14; 109 AIS 5.

32. E.g., 67 AIS 14.

33. E.g., 45 AIS AV-1.

34. 59 AIS 11; see also 96 AIS 19; 94 AIS 13; 68 AIS 4.

35. 84 AIS 1.

36. 90 AIS 12; see also, 98 AIS 8; 93 AIS 8; 90 AIS 12.

37. 114 AIS 20; see also 69 AIS 6; 61 AIS 20; 43 AIS W-10.

38. 97 AIS 11.

39. 54 AIS V-11.

40. 53 AIS WU-13; see also 64 AIS 21.

41. 98 AIS 21.

42. 106 AIS 24.

43. 78 AIS 19.

44. 97 AIS 22; see also 82 AIS 16.

45. 64 AIS 12.

46. 54 AIS V-11.

47. 106 AIS 15; 99 AIS 16; 99 AIS 2; 96 AIS 22; 96 AIS 20; 96 AIS 11; 89 AIS 15.

48. 96 AIS 12; 94 AIS 17; 52 AIS F-11.

49. 75 AIS 1.

50. 91 AIS 17.

51. 107 AIS 17; 96 AIS 1; 80 AIS 5.

52. 92 AIS 20; 44 AIS W-5.

53. 95 AIS 17.

54. 95 AIS 12.

55. 111 AIS 17; 102 AIS 10; 87 AIS 12.

56. 89 AIS 9; see also 93 AIS 15.

57. 98 AIS 15; 98 AIS 4; 93 AIS 17; 93 AIS 6. See also 85 AIS 9; but see 94 AIS 21.

58. 102 AIS 11; 98 AIS 18.

59. 101 AIS 2

60. E.g., 90 AIS 11.

61. 110 AIS 5; 101 AIS 4.

62. 101 AIS 11; 94 AIS 21. But see 3 AIS 7.

63. 92 AIS 9.

64. 89 AIS 11.

65. 115 AIS 7.

66. 112 AIS 2; 88 AIS 22.

67. 91 AIS 17.

68. 63 AIS 15; 44 AIS W-5.

69. 112 AIS 22.

70. 61 AIS 20.

71. 68 AIS 4. See also 94 AIS 13; 60 AIS 16.

72. 96 AIS 19.

73. 66 AIS 11; 61 AIS 11; 44 AIS W-6.

74. 111 AIS 18; 103 AIS 2; AIS 8; 93 AIS 8; 92 AIS 16; 90 AIS 12.

75. 48 AIS AW-12.

76. 50 AIS KX-13. See also 111 AIS 18; 106 AIS 15; 62 AIS 19.

77. 101 AIS 14; 101 AIS 13.

78. 107 AIS 10; 100 AIS 22; 99 AIS 16; 99 AIS 2; 96 AIS 12; 96 AIS 6; 94 AIS 17; 92 AIS 14; 89 AIS 15; 52 AIS F-11.

79. 112 AIS 15; 83 AIS 8.

80. 62 AIS 19.

81. 45 AIS AV-1. See also 83 AIS 6.

82. 102 AIS 8; 66 AIS 6.

83. 82 AIS 1.

84. 79 AIS 9; 61 AIS 21.

85. 90 AIS 16; 79 AIS 10; 78 AIS 9.

86. 101 AIS 9; 92 AIS 23; 89 AIS 16; 67 AIS 14.

87. 109 AIS 8. See also 113 AIS 12; 110 AIS 1; 107 AIS 13; 92 AIS 23; 78 AIS 7.

88. 98 AIS 4. See also 113 AIS 17; 112 AIS 1; 106 AIS 23; 102 AIS 11; 76 AIS 19; 65 AIS 20; 64 AIS 1.

89. 111 AIS 2; 110 AIS 21; 108 AIS 8; 64 AIS 7.

90. E.g., 105 AIS 10; 96 AIS 6; 94 AIS 17.

91. E.g., 98 AIS 12.

92. E.g., 89 AIS 9.

93. 75 AIS 7.

94. 103 AIS 18; see also 43 AIS W-4; 42 AIS AX-6.

95. E.g., Ore. Rev. State & 243.661(1) (1979).

96. E.g., 101 AIS 2; 86 AIS 4.

97. 63 AIS 4. See also 99 AIS 5; 65 AIS 17; 44 AIS W-6. Noting exceptions to rule, see 69 AIS 9.

98. See 107 AIS 8; 49 AIS AD-4.

99. 95 AIS 9.

100. 88 AIS 5; see also 67 AIS 7.

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Arbitrability

Presumption of Arbitrability: The contract will usually spell out what conditions must be met before the parties are obligated to arbitrate unresolved disputes. Included in these conditions might be the following:

(1) Grievance filed within the time limits in the contracts (usually a matter of days or a few weeks).

(2) Completion of the various pre-arbitral steps during which the parties seek to settle the dispute.

(3) A grievance which meets the contract definition of a grievance.

(4) A grievant who meets the contract definition of a grievant.

A common defense is that the arbitrator should deny the grievance, regardless of the merits of the grievance, because it fails to meet one of the contract's procedural conditions for arbitration. The defense is frequently raised by the responding party, normally the school district, and the defense is frequently denied by the arbitrator.

There is a generally accepted presumption of arbitrability that must be overcome if the school district is to succeed with the defense of non-arbitrability. In some cases, the presumption is explicit. For example, one arbitrator stated in a case that "the tradition presumption of arbitrability must be made."[1] Another reached a similar result in saying:

> Under these circumstances, in which the merits are split virtually evenly, it has been decided that the interests of equity are best served by a decision which finds the matter arbitrable.[2]

Another arbitrator found ambiguity in the time limits and stated:

> In addition, contracts containing ambiguous time limit provisions are generally construed to avoid a forfeiture. It is recognized that time limit provisions are inserted... to promote efficient processing of grievances. Such provisions should not, however, be designed as "a trap for the unwary."[3]

Where the time limits are expressed only in terms of "days" and the school year has ended in the spring, the arbitrator may interpret "days" to mean "school days." Under such an interpretation, the grievance might still be timely after the resumption of classes in the fall.[4] The arbitrator may reason that the purpose of time limits is to prevent the submission of stale claims. Where the dispute remains active and on-going, the arbitrator may prefer to focus on the substantive issues rather than upon procedural niceties.[5] Where the parties' relationship is new and they are processing a first grievance, the arbitrator may refuse to hold them too strictly to the procedural requirements.[6]

Arbitrators may feel that "an excessive reliance on procedures and formality would frustrate the purpose of collective bargaining..."[7] "Technical perfection" may not be required.[8] Defenses of non-arbitrability will be disfavored "when they are not emphatically pursued in the most timely fashion and spelled out with considerable clarity."[9] Contract language in support of the defense of non-arbitrability will be read narrowly.[10]

Arbitrability - Injury to the Respondent: The arbitrator may look behind the letter of the requirements for arbitrability to determine whether the failure by one side, usually the union, to meet those requirements, results in injury to the other side.[11] Where there is no surprise[12] or prejudice,[13] time limits may be waived and arbitrability found. Where there is actual knowledge on the part of the employer as to the true nature of the dispute, arbitrability will be found even though technically, the grievance does not meet the contract requirements.[14] In order to take advantage of this liberal approach favoring a finding of arbitrability, the union may be required to show that it did not deliberately delay[15] or otherwise act in bad faith.[16] On the other hand, where the employer school can show that by not following the contract procedure the district is disadvantaged, the arbitrator may require the letter of the contract be followed.[17] These latter situations appear to be infrequent. If the school seeks to claim disadvantage, commonly it will have to be actually demonstrated and not merely claimed. It will take evidence to prove the point.

Arbitrability - "Continuous" Contract Violations: Time limits on filing a grievance generally presuppose that the disputed incident occurred at some discrete point in time. Some types of grievances, however, may continue on over time. Where a grievance is found to be of this continuous character, arbitrability in terms of timeliness, is more easily found. Some grievances may reoccur daily throughout the year, such as when the school administration does not permit teachers to have a preparation time each day that the contract allows it.[18] Disputes over pay may arise anew each payday and hence be continuous,[19] although some arbitrators may not agree with this approach.[20] Other types of grievances may also be found to be continuous, for purposes of interpreting the time limitations in the contract.[21]

Timeliness Corrected in the Award: Arbitrators may use a limited award to help balance the rights of the parties after a finding of arbitrability on a close question. One arbitrator stated it in this fashion:

> While the failure to grieve initially or following the second evening meeting...might well have some bearing on the nature of the equitable remedy...it is not felt controlling in the matter of timeliness.[22]

Where the award involved backpay, an arbitrator found the long-delayed filing of a winning grievance resulted in backpay for only a part of the total time.[23] An arbitrator ruled that, where only a part of a group, sharing a common and long-term grievance, file a grievance and win it, and the filing group receives the award, the others, who did not file (all having the same information), are time-barred from filing.[24] However, the same rule may not apply where all of the potential grievants did not have the same information.[25]

Arbitrability and the Decision on the Merits: Arbitrators apparently prefer to resolve disputes on the merits rather than rule only on the procedural issues, such as arbitrability. One arbitrator skillfully approached the matter as follows:

> Upon the commencement of the hearing, the District moved the matter be dismissed as not arbitrable. Since this was the first time the District had raised the question of arbitrability, the arbitrator suggested, and the parties agreed, the hearing on the merits of the case proceed, and the threshold issue of arbitrability be addressed in briefs and reply briefs.[26]

Where such a procedure is followed, the arbitrator may rule first on the merits. If the school district has raised the arbitrability issue, and if the arbitrator rules for the school district on the merits, then the arbitrability issue is mooted. This has been the result in some cases.[27]

Raising Arbitrability: Where arbitrability, particularly timeliness, is being raised as a defense by the school district-employer, the issue must be clearly raised and supported by evidence at the outset.[28] Where the defense is not raised at the earliest possible step, or where the defense is raised for the first time at the arbitration hearing, some arbitrators find the defense to be waived.[29] A few decisions permit the defense to be raised at the hearing level for the first time.[30] Reasons given for requiring the prompt raising of this and other procedural defenses include the general presumption of arbitrability which favors settlement on the merits, and the notion that early notice permits the union to withdraw genuinely untimely grievances. The reasons given for permitting it to be raised at the hearing for the first time include the idea that the parties' attention should focus on the merits and settlement possibilities rather than on technicalities.

Time Limits - Formal Notice or Clear Knowledge: Time limits for the filing of a grievance begin to run after there is formal notice or clear knowledge. Where a time limit on the filing of grievances exists in the contract, one point of dispute can be as to when the time period begins to run. A teacher may have general knowledge about the subject matter of grievance, but the arbitrator may not start the timeliness clock until the matter is formalized, either by a formal notice,[31] a request to sign a waiver,[32] or by a formal denial of the claim.[33] The point in time at which the grievant receives clear knowledge may begin the tolling of the period. Clear knowledge may not be available until the grievant learns that others, similarly situated, are being treated in a different manner, i.e., another person is hired.[34] Finally, decisions made by the school district at the close of a school year may not have their impact until the beginning of the next school year and the time period begins accordingly.[35]

Early Filing: The impact of personnel decisions may not be known for a considerable period of time. If a grievance is filed at the outset, the school district may argue that it is not arbitrable because it was filed too early, no one has been injured yet. The arbitrator may not require an actual injury. The taking of a survey sample to be used in subsequent evaluations may properly trigger a grievance even though no one has yet been evaluated.[36] Letters inviting parents to attend after school conferences may permit the filing of a grievance even though no conferences have yet been scheduled.[37] Taking the first steps, of several, required for a school district to withdraw from the social security system may be enough to have the issue grieved.[38]

Past Failure to File: Another aspect of the arbitrability issue involves the failure of individuals to file grievances in the past and the impact past inaction might have on filing present grievances. The rule for some arbitrators is stated as follows:

> The failure of a party to enforce the clear unambiguous language of an agreement does not constitute a waiver...nor does a party's failure to file a grievance over a violation of a clear contract provision bar such party from insisting upon compliance.[39]

Note that this statement covers both the failure to grieve by the union and the prior failure of the school to demand its full contractual rights.[40] For other arbitrators, a failure to grieve in the past in some situations may result in a binding past practice,[41] although the union need not grieve every possible incident. A related defense that is sometimes used is the claim that the particular grievant who filed the grievance does not have the best possible case to file on the matter.[42] The school is not permitted to make the choice of who is the grievant, however, and this defense may fail.

Contract Date and Expiration: A grievance is tied to a contract, and arbitrability may depend upon whether or not the contract has expired. In some cases, the arbitrator may find that the right to process a timely grievance survives the expiration of the contract. In one case, a pending request under the prior contract had not been denied when the succeeding contract became effective and the grievance was found arbitrable.[43] In another case, the new contract was found to be retroactive, and the grievance survived.[44]

Findings of Non-Arbitrability: The foregoing should not be construed to mean that the school will always lose on arbitrability or timeliness issues. The defense is a difficult one, but it can be successfully made. One arbitrator stated a ruling in favor of the school in this manner:

> The delay becomes unreasonable. Unreasonable in that it is unexplained, in that it permits the possible backpay to accumulate, in that it places severe problems in the administration of [the]...program. The burden was on the grievant to proceed...[45]

Other cases are of a similar nature.[46]

Contract Interpretation

Role of the Arbitrator: The contract is the focal point in arbitration. The role of the arbitrator is to determine what the contract means and to resolve the grievance accordingly. Reasonableness and equity are important elements in arbitration, but the contract measures the limits. As one arbitrator states:

> But a contract is not an instrument which automatically establishes fairness and equity. It is the agreement of the parties which is binding upon the arbitrator and not his sense of fair play.[47]

Another arbitrator states a similar thought:

> ...an arbitrator will not sustain one interpretation...over another merely because he believes the result to be reasonable and just, if the Agreement contained clear language indicating that the other interpretation, albeit harsh, actually reflected the bargain struck by the parties.[48]

While it will be important for both parties to address the issue of fairness and reasonableness, the party who relies primarily upon these notions as the major support for their position is likely to be disappointed. The contract must be the basis for each party's argument. The arbitrator does not have unlimited authority to right all alleged wrongs.

Intent of the Parties: The role of the arbitrator is to interpret the contract. The right interpretation of the contract is the one that most nearly reflects the intent of the parties when they made the agreement. When the arbitrator construes the contract, sometimes the arbitrator will seek to find the parties' intent solely from the face of the contract and sometimes the arbitrator will seek to find the intent from the face of the contract and from other evidence.

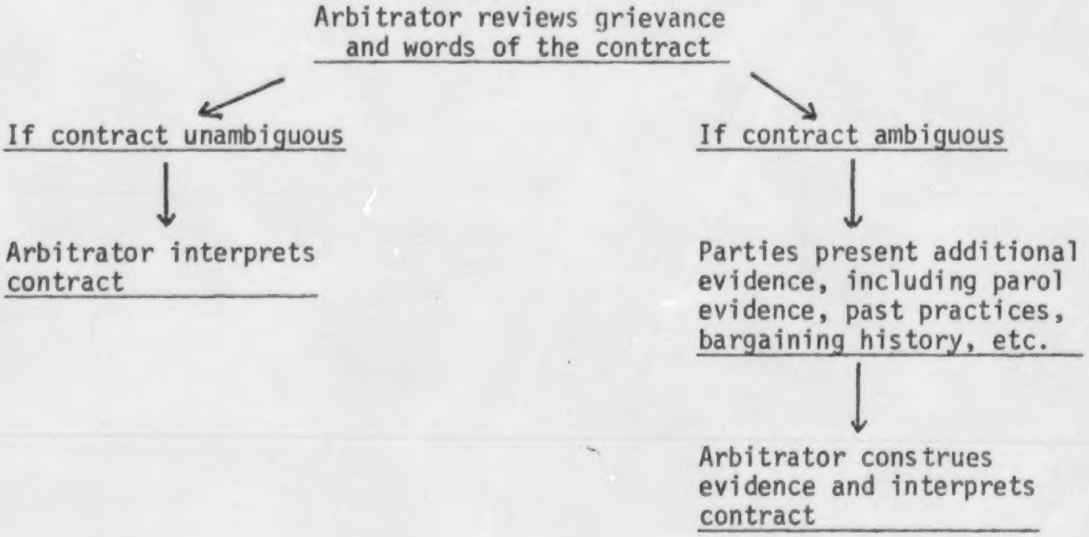
Ambiguity and Parol Evidence: Perhaps one of the most basic rules in contract interpretation is the rule that an unambiguous contract should be interpreted to mean what it says. Other evidence, such as parol evidence about "what the parties really meant," will not be considered when the language is clear. One arbitrator states the rule this way:

> The parties are bound by their final written contract language, and absent any ambiguity, parol evidence may not be received to fill out the meaning, especially where the language is clear on its face.[49]

Another arbitrator adds this language:

> When the bargaining eventuates in what purports to be a complete writing, the terms are taken for what they say. Previous or contemporaneous understandings are not permitted to add or vary the plain terms of the writing.[50]

The other side of the coin on this rule is equally important. Where the contract can be considered by the arbitrator to determine what is meant by the ambiguous language. The other evidence might be in the form of parol evidence, bargaining history, past practices, etc. Preparation of the case for arbitration must take into account both sides of this basic rule. Where a party's position is supported by the literal terms of the contract, that party will argue that the contract is unambiguous and the arbitrator should not consider other evidence. Where the literal terms of the contract do not support the parties' position, but the"intent" of the contract does offer support, that party must argue that the contract is ambiguous. If the contract is found to be ambiguous, then the party may present these other forms of evidence to the arbitrator. A contract can be shown to be ambiguous in many ways. The language may mention the disputed situation, but be very general. The language may cover a part, but not all of a situation. The language may cover a closely related situation, but not the exact situation. It might be shown to be ambiguous where each party reads the same language in a way that contradicts the other party's position, and both readings are tenable.[51] A contract may be shown to be ambiguous by showing the existence of a "side agreement."[52] Once a contract is shown to be ambiguous, reference to other evidence can be made, but the other evidence may not clarify ambiguity. In such a case, the arbitrator may still have to rely primarily upon the terms of the contract as the basis of the decision.[53]


Arbitrator reviews grievance and words of the contract
If contract unambiguous
Arbitrator interprets contract
If contract ambiguous
Parties present additional evidence, including parol evidence, past practices, bargaining history, etc.
Arbitrator construes evidence and interprets contract

It is fundamentally important that the parties realize that they may not resort to the many forms of extrinsic (to the contract) evidence unless the contract is determined to be ambiguous. Proof of what was "really meant" may be rejected by the arbitrator where the contract language is clear and unambiguous.

The Whole Contract: In many cases, the contract must be construed as it is written on its face. Resort to extrinsic evidence either is not needed or is not conclusive of what the parties intended.[54] A variety of rules are recognized which may be of assistance. Some of them will be mentioned here. A quick summary of some of these rules was made in the following manner:

> Words are considered or interpreted in their common and accepted meaning unless the parties indicate a special meaning by definition. If the words of a contract are clear and unambiguous, those words are controlling, and there is no question of construction or interpretation. If the words are unclear or if there are ambiguities and uncertainties or inconsistencies between and among sections and paragraphs of the contract, the whole of the contract is studied in order to relate one undertaking to another in an attempt to arrive at a reasonable construction that will effectuate the intentions of the parties.[55]

An important rule, mentioned by numerous arbitrators, is the requirement that the contract be read as a whole.[56] Words or phrases should not be taken out of context for interpretation. Each section must be harmonized with the whole of the contract. Individual parts must be reconcilable with the whole. Parties who seize upon a word or a phrase to justify their contentions should be ready to show how their interpretation fits into a rational explanation of the whole agreement. A contract has a purpose behind it and a preferred interpretation must fit that purpose.

Giving Meaning to All Clauses: A contract should be interpreted so that all clauses have meaning. As one arbitrator stated:

> It is a canon of contract interpretation that language should be interpreted so that words used by the parties not be rendered meaningless.[57]

This rule relates to the one requiring that a contract be read as a whole. "Except in cases of specific exception or surplusage,"[58] one clause should not be interpreted so as to have the effect of making other clauses inoperative.

> Where it is possible to find either conflict or no conflict between two provisions of a contract, the reading which results in no conflict is to be preferred...[59]

The goal is to "avoid nonsensical results and exercises in futility,"[60] to reject an argument which "would, in effect, negate the impact" of a specific clause,[61] to make a provision "meaningful,"[62] and to avoid rendering language a "nullity."[63] Of course, just as the contract should not be applied in a mechanical manner, the rules of contract interpretation should not be applied in a mechanical manner.

> In labor agreements it is particularly important to seek a rational and practical decision since that parties must, from day to day, live with the contract and operate the educational enterprise, at least to some extent, under it.[64]

Common Meaning of Words: The contract often contains a definition section. In that section, the parties can identify and define words in any unique way needed to accomplish their mutual, contractual intent. Where the contract contains specific definitions, the arbitrator must apply them. Most words in the contract, however, will not receive special attention in the definition clause. The arbitrator's choice for construing this undefined language is to give it a common, everyday definition, such as a reasonable person might use.[65] Educators are commonly accused of creating their own peculiar, technical jargon for the conduct of their professional activities, but their contracts will not be so interpreted by arbitrators absent a showing of specific intent.

> ...[T]he words used in an agreement are to be given their ordinary and usual meaning unless the parties intended the verbage to have a special meaning.[66]

The "common meaning" of words is found, in many cases, by reference to a standard dictionary, such as "Websters."[67] Occasionally, other sources will be used.[68] It is important for the parties to keep this rule in mind because it may apply in several situations. A party should not contend in arbitration that, during negotiations, they harbored a private, special definition of the word. A party who focuses on a particular word as the solution to a grievance should check a dictionary definition and test whether their argument will survive the application of that definition. It is important to note that arbitrators have not identified school arbitrations as a unique breed of disputes. Absent a specific and provable mutual intent, the school contract will be treated by the arbitrator like any other collective bargaining agreement found in other sectors of the economy. Having stated the general rule, however, it is also clear that exceptions may be found:

> ...words cannot be given their bare dictionary meaning, but must be construed with a lively awareness of what the parties were getting at when they chose this language.[69]

In addition to construing words, in order to give meaning to a contract clause, the arbitrator may also have to construe the presence, absence, and use of punctuation. For example, one detailed analysis by an arbitrator begins by saying, "In the event that the words or phrase is intended to be restrictive, no marks of punctuation are used."[70]

Construing Ambiguity Against the Drafter: The party who proposes and drafts language which is incorporated into the contract bears the burden of making that language clear. One arbitrator stated the rule in this fashion:

> [T]he proponent of a contract provision, such as the Employer in this case, must not leave a matter in doubt as to what he intends by such contract language. If he does not explain what is contemplated, then any ambiguity in the language he proposed must be construed strictly against him.[71]

Drafters of a clause should not be permitted to take advantage of their own ambiguity. Under this rule, it could be an unwise tactic for a party to a contract, who did not have the bargaining strength to get what they really wanted, to settle for an ambiguously drafted clause. The hope that a later ambiguity would be resolved in their favor is unlikely.

There is an important, related rule of contract interpretation that may be used by the arbitrator. That rule was indicated by an arbitrator in the following manner:

> The testimony indicates that this provision...consumed a substantial amount of time and effort of the negotiators. It is assumed, therefore, that the parties said what they meant since this was not a trivial issue...[72]

Under this rule, where there is evidence that a clause was carefully drafted, the arbitrator may be more inclined to give the clause a more literal interpretation. Thus, where both parties carefully went over the contract language so that both, in effect, drafted it, the arbitrator may be less inclined to find an ambiguity which permits a party to claim a result peculiarly advantageous to them. For example, where the arbitrator reviews a carefully drafted clause, which states several express conditions, the arbitrator is unlikely to accept an argument that there were additional implied conditions involved. As one said:

> I note that had the parties wished to attach such a condition they knew precisely how to do so.[73]

In other words, skilled drafters may be held to higher standards of expertise. They may not argue later that their intentions were incompletely stated.

The relationship between care in drafting and ambiguity is explored in one other context. Negotiation of a collective bargaining agreement often involves a mix of novice educators and skilled lawyers. Problems, arising from this situation, have been solved by the following rule:

> Arbitrators are less inclined to strictly construe contract terms against beginning bargainers that were advantaged by shrewd and sophisticated negotiators.[74]

May and Shall: Specific words in the contract are generally given the meaning which the parties mutually desire. However, in many situations, the intent of the parties is not provable, and the arbitrator will have to give the words their common meaning. Furthermore, a few words have become virtually "words of art" or words having a commonly recognized meaning. In grievances involving these words, it is difficult for the arbitrator to give the words any meaning other than their technical one. "May" and "shall" fall into this category. Where the contract provides that the school "may" do something, the word is understood as giving the school discretion, that the action or decision is not mandatory.[75] On the other hand, "shall" is construed as being mandatory and does not give a party a discretionary choice. "Will" is construed as being the equivalent of "shall."[76] The parties must be careful in negotiations to select the words which express their true intent. When the parties subsequently read the collective bargaining contract, they should recognize the commonly agreed upon meaning of these terms.

Other Construction Aids: A variety of other aids in contract construction are available, and a few are briefly summarized. Where the question concerns whether or not a teacher, for example, is covered by the contract terms (i.e., is within the collective bargaining unit), the arbitrator may refer to the recognition clause in the contract to help define the scope of the unit.[77] Thus, a clause, such as the recognition clause, which may look like "boilerplate" may become extremely important in a particular grievance. A variety of responsibilities are often negotiated obligating the school district either to take certain action or giving the school district the choice of whether to act or not. When the time comes, the teachers' union argues that it is "mandatory," while the school district argues that is "permissive." These grievances are often very difficult and no general rule to answer the problem seems to be available. Some precedents are available, however, to illustrate what might happen. Where the contract language is "shall be taken at the discretion of" the school, clearly this is permissive and not mandatory.[78] Use of the phrase "if possible" was found by one arbitrator to be "much stronger than 'other things being equal' or 'if available' or 'if feasible,'" but it was not found to impose a mandatory duty.[79] The phrase "every effort" was found to impose a large burden on the school district and found to require a reasonable effort to achieve the goal.[80] A reasonable effort, however, is still less than a mandatory duty. The phrase "where practicable" was also found to impose a reasonable effort, but not necessarily a mandatory obligation.[81]

The language that a teacher shall not be deprived of "professional advantage" is very ambiguous. One arbitrator, however, defined it in terms of no loss of salary.[82] References to the work "day" are often ambiguous. "Teaching day" is not necessarily the same as "work day" when the issue involves meetings following the close of classes.[83] Similarly, "teaching periods" is not necessarily co-extensive with the full work day.[84]

When parties cannot agree upon a final resolution of a disputed point during negotiations, they may provide for mutual discussion of the issue at the time it becomes critical. The choice of language here includes providing for a later "meeting" or a "hearing" or "consultation" or "negotiations" between the district and the union. Absent other evidence of intent, it appears "meetings" or "consultation" are likely to be construed as informal devices while "hearings" or "negotiations" are likely to be construed as more formal and more binding devices.[85]

Some contract clauses contain first a general reference to a class of items, and then a list of specific items covered by the clause. Later a dispute arises over whether the reference to the general class expands the number of specific items covered by the contract. One arbitrator stated the rule this way.

> Arbitrators often rely on the doctrine that "to express one thing is to exclude another." In other words, to mention one item of a group or class of items, and not to mention others, may be construed to mean that others were meant to be excluded.[86]

Another stated it this way:

> It is generally accepted tenet of arbitration that where there is a seeming conflict between the requirements of two or more provisions...the specific prevails over the general.[87]

Similarly, broad statements contained in the preamble to a contract do not expand the scope of specific clauses found in the body of the contract.[88] Also, related to the restrictive reading of various clauses, is the role of the so-called "zipper clauses." The "zipper clause" is one commonly used at the end of the contract which indicates that the contract represents the whole of the agreement and matters not included in the contract were waived. While the "zipper clause" often looks like boilerplate, it may effectively stop the raising of matters not specifically covered in the agreement.[89]

Contract interpretation can be a difficult task for the arbitrator. The parties have it within their power to help. It may be useful to keep in mind what one arbitrator said:

> Laudable as its declared purpose may have been intended to be, the contract is absent of any language to implement it. Nor, has there been any testimony adduced by either side to indicate what the parties actually intended when the clause first appeared in contractual form in 1969, or what they expected of themselves to implement it.[90]

Management Rights: An important clause to be construed in every school contract is the management rights clause, wherein the school employer reserves certain areas for unilateral decision making. This clause is the basis for one of the most common defenses used in school arbitration. It is not the authors' purpose to explore the depths of this defense, but rather to raise a few points on the issue. The management rights defense commonly has several levels of analysis. At one level is the language of the contract itself, which may be somewhat ambiguous. Another level for analysis is the statutory scheme under which the school system is authorized by the legislature.

Commonly, this legislation contains an open-ended grant of authority to the school administrators. Yet another level is the collective bargaining statute itself, which may set up categories of subject matter, some of which are mandatory subjects of bargaining, some of which are permissive subjects of bargaining, and some of which are prohibited or illegal subjects of bargaining. Thus, the school district might defend its action on the basis of an alleged grant of unilateral decision-making authority in the contract, in the legislative grant of authority to the school board, in the bargaining restrictions in the collective bargaining statute, or it may use some combination of the three defenses. In some cases, one or more of these defenses may be summarized by the idea that the grievance involves a matter of "educational policy,"[91] with the implication that it is a matter reserved for employer unilateral decision-making.

The arbitrators' approaches to these defenses are cautious and, in many cases, somewhat tentative. In general, the arbitrators will probably reject most blanket defenses built on management rights which preclude the arbitrator from even considering the case. A common approach is to recognize the broad powers of school management, but to also recognize school management has entered into a collective bargaining agreement and has voluntarily relinquished some of its authority in the agreement. Thus, the focus becomes the contract and how, if at all, the school district has limited its own authority. One arbitrator expressed the matter this way:

> Since all matters negotiated touch in some way on educational policy, it follows that the School Committee has, on its own will, bargained away some of its discretion. The very existence of the Agreement establishes the obvious truth of this conclusion. Thereafter the specific provisions of the Agreement apply rather than the broad reservation of exclusive discretion.[92]

Once the arbitrator has shifted the attention from the broad blanket defense to the specific words of the contract, the arbitrator may still recognize certain traditional areas of management prerogative. A number of the management prerogatives commonly used by school arbitrators are not unique to schools, but rather are those prerogatives traditionally recognized as belonging to management in the private sector. Among these areas are "a universal right to establish rules and regulations governing conduct of employees,"[93] "the right to fill positions as it sees fit, except as limited by law, the agreement between the parties, or in some cases, custom, policy, or practice,"[94] "scheduling is a basic and well-recognized employer prerogative,"[95] "determine the content of jobs,"[96] and "the first determination of ability to perform the promotional position."[97] A prerogative which is more uniquely related to the filed of education is "the Board's legal responsibility to operate the school district in accordance with its educational goals and budgetary limitations."[98]

As indicated above, it is common first to base the management rights defense on the contract itself, and to then recognize some basic rights generally shared by any management. The arbitrator balances the specific clauses in the contract against the general rights of the school administration. If the contract, properly construed, gives the school district unilaterial authority, the grievance is resolved accordingly. If the school district does not have unilaterial authority, the balance commonly is made in, at least, two different ways. One way is to recognize the right of the school to decide and act, but temper it be a requirement of reasonableness.[99] Another way is to identify from the contract certain required procedures or criteria which must be used by the school before the school makes a final determination.[100] Another recognition of the management rights defense occurs in cases when the arbitrator rules in favor of the grievant on procedural matters, but stops short of substituting the arbitrator's view for the substantive decision of management. The arbitrator will only go for enough to insure that the school district has been reasonable or observed the contractually required criteria or procedures.[101] In sum, the arbitrator subordinates a claimed management right to require management to abide by the procedural limitations of the contract, the arbitrator normally does not substitute a specific substantive decision for management's decision.[102] Finally, where a broad management right is claimed, the defense is more likely to fail on procedural issues than on substantive issues.

A clause closely related to management rights is an emergency clause. The clause provides that in the event of an emergency, the school is permitted to make unilateral decisions to overcome the emergency. A major dispute involving this type of clause is how an emergency is defined. Where the situation is "self afflicted"[103] or involves a long term and pervasive, chronic problem,[104]or results from indecision,[105] no emergency may be found for purposes of the emergency clause. Where a "sudden and percipitous event"[106] or "sudden, unexpected and unpredictable" event occurs,[107] it may qualify as an emergency permitting unilateral action. A good faith belief in the existence of an emergency, even though the arbitrator finds that in fact it was not an emergency, may not be sufficient to justify unilateral action permitted in an emergency.[108]

Past Practices: One of the most important tools used to interpret a collective bargaining agreement is the past practices of the parties. One arbitrator states the following:

> For it is a well-established principle in arbitration that when a contract is unclear, the parties' custom and past practices may be the best, indeed the only evidence of the parties' intent and understanding of the language of their contract.[109]

The significance of past practices is illustrated by even stronger statements:

> An enforceable labor agreement, unless expressly stated in the contrary, consists of the time of its execution of the written agreement itself and the then valid and binding past practices which has not been changed, altered or modified by the parties.[110]

The importance of past practices is also underscored by the relationship some arbitrators find between the management rights provision and past practices. An arbitrator stated:

> (The past practice) was not a matter of Management giving up a Management Right but rather a highly acceptable way of resolving a problem not covered by the Labor Agreement nor by any specific provision therein.[111]

The often solicitous attitude toward management rights clauses demonstrated by arbitrators may be modified by the school's own past decisions. The school may claim a management right, but a review of past practices may show that in the past the school did not in fact ever utilize its claimed unilaterial powers. If it did not act unilaterally in the past, it may be limited now. Past practices may go to both the procedure and to the substance of school district decision-making.[112] Other arbitrators would, however, hold past practices subordinate to the management right.[113]

Valid past practices are defined in a variety of ways. One of the more demanding definitions sets out five elements:

1. A consistent and ascertainable course of conduct.
2. Conduct engaged in for some reasonable length of time.
3. Conduct of which both parties are aware.
4. Conduct which does not vary the express written terms of the collective bargaining agreement.
5. Conduct which is in response to a given set of specific circumstances and conditions.[114]

Other definitions contain three elements:

1. Knowledge of the parties.
2. Mutual consent, explicit or tacit.
3. Longstanding and consistent application.[115]

Other language that is used includes unequivocal, mutually accepted, clarity, durability, shared understandings, absence of grievances on the subject, system-wide practice.[116] A single incident is usually not sufficient to create a valid past practice.[117] However in special circumstances, a few instances may be sufficient.

> There is no question, but a single incident or the happening of a solitary circumstances does not a practice create. However, when a situation arises only on occasion, fewer instances or happenings would be required to establish a practice than would be required where the situation often arose.[118]

By the same token, absolute uniformity may not be required.

> Where evidence overwhelmingly supports the existence of a past practice, testimony of isolated instances to the contrary will not mandate a contrary finding.[119]

A past practice remains valid, as long as the conditions are met, even though it is not incorporated into the contract.[120] However, where the existence of a past practice is somewhat in doubt, if the contract includes a "maintenance of standards" clause, the clause may help foster the recognition of the practice.[121] A past practice will not be recognized where the practice was wrongful[122] or perhaps unreasonable.[123]

The burden of proof is upon the party claiming the existence of a past practice.[124] Some arbitrators require a high level of clarity and specificity before recognizing the existence of a past practice because of the important impact the practice could have.[125] Proof of the existence of a past practice alone may not prove a party's point. The proof must also show the specific details in question. For example, proof of a past practice of giving a preparation period to teachers may not also prove that the preparation period was always given at a fixed time.[126] Proof that teachers historically participated in an "open house" does not prove a past practice that no excuse for not attending would ever be adequate.[127]

Once a past practice is established, it is as binding as any term of the contract. The question then becomes how do the parties terminate an established past practice. Clearly, the most effective way to terminate a past practice is to agree in the contract to another way of handling the situation.[128] One arbitrator states the following:

> ...if the School District wishes to discontinue the past practice it may do so only after the current contract expires, and only if it serves notice to the Union of its intention.[129]

Other situations are more difficult. Where the school district raised the issue of a particular past practice in negotiations and sought to eliminate it, but later dropped the matter, the past practice was found to continue to be valid.[130] Where the teachers' union sought to include a past practice in the contract and failed, an arbitrator, nevertheless, held that the past practice to continue to be valid.[131] Related to this is the notion that the failure of the union to protest or grieve a school district decision does not necessarily create a past practice by non-objection.[132] Where the basis of the past practice is found factually incorrect, a past practice may be ended unilaterially.[133] When the basis of the practice changes, the past practice may be unilaterally terminated. One arbitrator stated:

> No past practice exists in a vacuum. Every past practice necessarily rests upon a foundation. That foundation is the factual circumstances out of which the practice arose... when those conditions change, when the foundation upon which the practice rests shifts, then the practice itself may properly be altered.[134]

A negotiated change or a change in underlying circumstances are the clearest methods for altering a past practice, which otherwise has the same force and effect as the contract.

In some situations, contract language and past practices conflict. The general rule, as stated by one arbitrator, seems to be as follows:

> Nonetheless even though it may be firmly established, past practice can only be governing in a matter such as this in the absence of clear and unambiguous contract language. It controls where the contract is silent and serves to "fill the gap" in the contract.[135]

The key to this rule lies in the notion of an unambiguous contract. Where ambiguity exists, the past practice may be controlling. However, in a few situations, arbitrators have upheld a past practice even in the face of unambiguous contract language.[136]

Bargaining History: Another important element in the interpretation of an ambiguous contract is to look at the bargaining history. Where a past policy of doing matters in a certain way exists, and the union, for example, seeks to alter the policy in negotiations, but fails, this may be deemed to be strong evidence that the pre-existing policy remains in force.[137] Bargaining history may also help to establish the existence of a past practice. Raising a demand in negotiations and subsequently dropping it is probably more meaningful when there is a pre-existing conflict about a subject, than when there had been no prior controversy.[138] An arbitrator's reaction to bargaining history may differ given the particular facts of a case, as shown by the two, conflicting views stated below:

View Number One:

> It should be clear to the parties that when language which appeared in the demands of either side does not appear in the final actual contract, that failure to include the language must have meaning.[139]

View Number Two:

> Unsuccessful efforts to clarify ambiguities or to codify existing practices neither cause the proposing party to lose whatever pre-existing rights it had, nor confer additional rights on the other side.[140]

The use of bargaining history may involve very delicate considerations. There is a considerable risk in overusing bargaining history. The risk is that the arbitrator will go beyond the traditional role of interpreting the contract and give a party in arbitration what that party sought, but did not get, in negotiations at the table.[141] The parties' reactions at the negotiations table should concentrate on that phase of the relationship. The table should not become a forum of major attention in subsequent arbitration. Within these limits, bargaining history can play a useful role in subsequent contract interpretation.

Evidence

Introduction: The AAA rules provide that the parties may introduce "such evidence as they desire." Legal rules need not apply, accordingly, hearsay evidence may be used. Witnesses who testify orally may be subjected to cross examination. The arbitrator may request particular types of evidence from the parties. Presenting evidence in the form of witnesses or documents can be a time-consuming and laborious task. Where agreement can be reached, the parties may be able to stipulate some or all of the essential facts and shorten the hearing process.

Burden of Proof: Understanding the burden of proof can be important to the parties in at least two ways. First, if a party knows who has the burden and what the level of the burden is, the information can help decide whether to settle the grievance at an earlier step of the grievance process or pursue the matter to arbitration. Second, understanding the burden of proof helps the parties marshall and organize their evidence in a manner most likely to appeal to the arbitrator.

Burden of proof can be an important threshold issue. In a close case, the winner may be determined by the burden of proof. Where evidence is about equally weighted on a given point, the party with the burden of proof may lose because they could not meet the burden. One arbitrator states it in this manner:

> The evidence does not tip either way. In such event, the evidence from the parties may be considered to be in balance. Such a posture is not of the quality to permit me to find for the grievant for the balance must tip to her side and that...it does not.[142]

An important question about burden of proof is, where is it placed? Which party has the burden of proof? Contracts rarely speak to this issue, so the arbitrator must decide. The decisions contain both generalized statements about the burden of proof and the application of these rules to particular factual situations. A commonly stated general rule is set out by one arbitrator as follows:

> The standard we are required to apply in arbitration cases regarding proof, is that he who affirms, in this case the Board, must prove.[143]

Another general rule already alluded to is the rule that "ambiguous language of a contract should be construed against the party who proposed it."[144] Similarly, the party asserting the existence of a past practice has the burden of proving it,[145] and where a past practice has existed, the burden is on the party seeking to put an end to it.[146] The burden of proving non-arbitrability lies on the moving party.[147] It is not the goal here to enumerate every possible issue and definitively allocate the burden of proof for each issue. At best, the results indicated in the cases are not always clear. In addition, the allocation of who has the burden may relate to how heavy the burden is found to be.

Setting aside for the moment further discussion of where the burden of proof is placed, it is necessary to consider what the nature of the burden is, in other words, how much? The traditionally recognized categories in the law are as follows, in increasing weight of the burden:

1. Substantial evidence (reasonableness) (used in the review of decisions of administrative agencies)
2. Preponderance of the evidence (51 percent) (used in many civil trials)
3. Clear and convincing evidence (an ill-defined heavier burden)
4. Beyond a reasonable doubt (criminal trials)

These categories are also commonly used in arbitration. The arbitration decisions, however, become more difficult to understand when the arbitrators begin to combine the various categories, or to add various qualifying adjectives to a particular burden of proof. (It is noted that courts frequently use similar, confusing approaches). Arbitrators, in addition to the traditional categories, use such phrases as "a fair or reasonable preponderance," "a preponderance of clear and convincing evidence," and "substantial and convincing proofs."

In addition to the overall burden of proof, the arbitrator may use the notion of shifting "the burden of going forward." Under this concept, the grievant with the overall burden of proof may be permitted to put forward a de minimus but plausible case--the so-called _prima facie_ case. Having established the _prima facie_ case, the burden of going forward, i.e., responding to the _prima facie_, is placed on the other party, the respondent. If the other party, the respondent (often the school) puts forth a plausible explanation, the grievant must respond in a convincing manner or lose. If the school, the party with the obligation to go forward cannot offer an adequate explanation, then the grievant wins. This approach is commonly used in race or sex discrimination cases.[148]

Discussion of burden of proof are often ambiguous. An arbitrator may use words to describe the results that do not reflect the standard of proof the arbitrator is actually using. Even the four traditional categories, outlined above, cannot be defined so clearly to make them completely separate, watertight categories. In addition, arbitrators may often be more inclined to get to the merits of grievance and resolve it rather than spend a significant amount of time clearing out procedural thickets. For these and other reasons, the statements of the arbitrators about the burden of proof issue may be more ambiguous than their actions.

With all of the above cautions in mind, it may still be useful to attempt a partial, generalized summary of burden of proof. The burden of "beyond a reasonable doubt" is probably only rarely used, and when it is, it is likely to be in situations involving facts similar to those found in the criminal trial setting.[149] At the other end of the scale, the "substantial evidence" test or reasonableness test is very commonly used. While the nuances of the words may carry some additional meaning, it is likely that when most arbitrators speak about "arbitrary, capricious, or discriminatory" (other than the civil rights context) actions, they mean something akin to a reasonableness test, that is, less than a preponderance of the evidence. "Good faith," "best interest of the school system" and other such phrases probably fall into this category. Where the school district need only show that its actions were reasonable, the grievant will have a difficult time winning the case. One arbitrator described the role of this test in the following manner:

> It is sufficient that the employer show by solid and substantive evidence that his/her decision to terminate was fairly arrived at by a consideration of the facts and circumstances and a fair and logical conclusion based thereon. Having done that, the employer's determination may not be be set aside, even though others, including the arbitrator, may reasonably have come to different conclusions.[150]

The key phrase in this statement is the notion that the school district's decision is valid "even though others...may reasonably have come to different conclusions." This suggests that the role of the arbitrator is to review for reasonableness, not second guess the district or find a "more" reasonable decision. In this type of case, commonly the grievant will put forth a prima facie case, shifting the burden of going forward to the school district. Once the school district has demonstrated reasonableness, the grievant has the difficult task of rebutting the evidence. Rebuttal will not be shown simply by showing other alternatives existed. Examples of cases using this reasonableness approach include non-disciplinary terminations,[151] changes in reporting or other administrative procedures,[152] selecting between nearly equally, qualified candidates for a position (not involving seniority preferences),[153] extra duty grievances,[154] transfers,[155] and evaluations.[156]

In cases where the grievant is alleging that the school district acted in a retaliatory manner because of the grievant's union or free speech activities, or because of grievant's personal beliefs, the school, may in some cases, have to justify its decision by a preponderance of the evidence or clear and convincing evidence.[157] Where the school's actions impugn the integrity or moral character of the grievant, the school district may have to carry the burden by a preponderance or clear and convincing evidence.[158] Severe discipline cases, may be measured by a preponderance or clear and convincing evidence test.[159] Actions involving a "just cause" provision may be judged by a reasonableness standard or preponderance or greater standard depending upon the management action involved, e.g., transfer v. discipline, and what the basis of the action is alleged to be, e.g., moral turpitude or budget considerations.

In summary, the burden of proof cases are difficult to categorize and often difficult to understand. Whatever "rules" may exist, they are extremely flexible, leaving the arbitrators to make ad hoc determinations of a highly pragmatic character. As suggested above, some general guidelines exist to fit some situations. It is useful if the grievant union can identify in advance those cases where school district's action will be upheld if the district merely acted reasonably, since these cases are quite difficult for the grievant to win.

Precedents

Introduction: Arbitration is a system of "law" created by, defined by, and limited by the mutually agreed upon contract. However, arbitration does not exist in total isolation. Furthermore, most grievances are not original, first-time situations. Other arbitration awards, legislation, or court decisions may have considered similar or related problems. This section considers the role of these precedents in school arbitration decisions.

Arbitration Precedents: It is sometimes said that there are no precedents in arbitration. That common statement, however, does not reflect the language of the school arbitrators in the cases under study. In some decisions, little weight is accorded prior awards, as indicated by the following language:

> The arbitration decisions noted above merit consideration... They are not controlling in the instant situation. They are merely a useful guide.[160]
>
> However, the record in this case is unclear as to the reasons for the prior settlement or even exactly what the terms of the settlement were. Under the circumstances the Arbitrator was not persuaded to give any weight to the disposition of the earlier grievance on this matter.[161]

In other decisions, considerable weight is given to prior decisions. One arbitrator stated:

> I am quite cognizant of the concept which suggests that a prior award between the same parties on the same issue should be followed unless it is palpably erroneous.[162]

Another states the following:

> The parties have agreed that the decision of the arbitrator shall be both final and binding. Right or wrong, in most circumstances, it would seem that the first arbitration award should be honored.[163]

One arbitrator listed the following conditions under which a prior award should not be honored:

> (1) new and substantial evidence exists which was not available when the case first was heard, or (2) lack of clarity or other reasons make the execution of the award impossible, or (3) there was no full or fair hearing; (4) where continued application is rendered questionable by changed conditions; (5) which they consider to be clearly erroneous....[164]

A number of reasons are given as to why prior awards should be recognized, or the circumstances in which prior awards should be recognized:

> ...it seems to me that the prior decision is significantly more controlling where there has been subsequent opportunity to renegotiate the contract. For if the prior language remains unchanged, it is fair to say that the parties have in effect acquiesced in the meaning of the language found by the prior arbitrator.[165]

Another reason stated for giving consideration to a prior award is the following:

> To do otherwise would be to inject a degree of uncertainty into the grievance and arbitration process that would encourage parties to have their contracts rewritten by arbitrators and encourage repetitive grievances and arbitrator-shopping to obtain a favorable decision.[166]

Another arbitrator reinforced the foregoing argument in favor of giving weight to prior awards in the following statement:

> Unless (the prior award)...can be shown as palpably wrong, its interpretation of the Agreement should not lightly be disregarded. Otherwise the parties face new and differing approaches to similar problems whenever a new arbitrator is called upon to interpret the Agreement.[167]

A completely different approach to the precedent issue is taken in a small group of cases. In those cases, the arbitrators in their decisions decl[illegible] that the award should have no precedent! One wonders whether such a decision [illegible] be made self-limiting. However, in several circumstances, the awards were explicitly described by the deciding arbitrators as not constituting precedents for the future.[168]

Arbitration precedents can be of two types. One type is a precedent involving the same parties, the same (or similar) contract language, and the same issue. Another type involves a similar issue, but different parties and different contract language. Clearly the precedential value of the first type is much greater than that of the second type.

External Law Precedents: The arbitral process is a creature of the contract. In collective bargaining in education, the contract does not exist in isolation. There are private sector-NLRB analogs, legislation creating and directing the operation of the school system, equal employment legislation, collective bargaining legislation, and various agency decisions. In various cases, these matters may enter into the school arbitration process. A common way to interject external law into arbitration is as a defense by the school district. The statutory law, which establishes the school system, often contains an expansive delegation of authority to the school board. The school board then uses this language in a variety of ways in arbitration: (1) to argue that a grievance should be denied because the school has a statutory management right, or (2) to argue that a term of the contract or of a possible arbitrator's award would violate the school's authority under the school legislation.

Arbitrators show diverse reaction to these external sources of authority. An extended statement by one arbitrator discusses the various approaches that might be taken:

> [There are] differing philosophies among arbitrators as to the extent to which external law should be applied...There is...no difference of opinion if the contract language...directs the arbitrator to consider external law...If the contract language is ambiguous, the arbitrator may give consideration to external law as an aid in interpretation of the contract. However, if there appears to be a conflict between the contract language and external law, it can be said that there are three views...What might be called an "orthodox view" dictates that the arbitrator shall interpret the contract without reference to any law external to it. What might be called the "liberal view" holds that the arbitrator has a duty to consider all law that is relevant to the issue...What might be called a middle view suggests that the arbitrator could consider external only to that extent necessary to assure himself that his decision is not forcing the parties to violate the law.[169]

The case law reflects the above statement, with some variation. In a number of cases, the arbitrator states that external law cannot be applied unless it has been specifically incorporated into the contract.[170] An important corollary of this rule would be that the parties cannot meaningfully use external law in their arguments before the arbitrator because it will not be relevant. Thus, it becomes vitally important for the parties to identify what role, if any, external law will play so that their presentations can be as persuasive as possible.

The exclusion of external law is often justified on the notion that there is little or no overlap between arbitration and external law. One arbitrator stated the dichotomy in this fashion:

> It is often overlooked that the school code set forth certain definitions, conditions and requirements which do not really pertain to the collective bargaining context, but rather relate to the limited objectives of the School Code.[171]

Another stated the matter in this way:

> I do not sit as a judicial judge called upon to interpret public laws, rather as a private judge to interpret the contractual obligations created by the parties.[172]

Thus, external laws may be excluded because the contract does not provide for its consideration, or because the arbitrator views the goals or functions of the external law to be different than those of the arbitral process. Another reason for excluding external law considerations is based upon a "better forum" notion. The courts provide a "better" forum for the resolution of "legal" issues than does arbitration. The courts have the jurisdictional power to make a determination on an authoritative basis, the arbitrator does not.[173]

Another group of cases include external law in the arbitration decision-making process. One type of case in this group simply includes citations and discussions of external law with little or no discussion of whether it is appropriate to consider it. The arbitrators are impliedly stating that it is relevant and proper to consider external law.[174] Another type of case refers to the external law where it will aid in the interpretation of the contract. One arbitrator stated the matter in this fashion:

> One should assume that in entering into the contract the parties intended to comply with existing provisions of the State Education Law. The provision therefore might be properly employed if the contract were silent on the subject or might be of assistance in construing provisions of the collective bargaining agreement that were ambiguous and with respect to the proper interpretation of which the parties differed.[175]

The external law may provide a "gloss" on the contract, the contract, however, remains the basis of jurisdiction and authority.[176]

In a number of contracts, external law is incorporated into the contract by the parties.[177] One arbitrator found such an incorporation in the contractual phrase "except as otherwise provided in this agreement, or by Law, it is agreed..."[178] Where the contract requires interpretation of external law, the role of the arbitrator is as arbitrator not judge. One arbitrator stated the matter as follows:

> The parties have incorporated these regulations by reference and have...vested the arbitrator with authority to interpret them...thus when the arbitrator construes the (Commissioner's) Regulation he in effect merely defines a contractual term in the parties' agreement. He does not purport to define the Regulations as far as they affect anyone not a party to this proceeding.[179]

Reference to the external law in the contract does not necessarily mean that the arbitrator will rely upon the reference to broadened jurisdiction. The arbitrator may merely determine whether there is a "clear" answer from the courts on the legal point in issue. If there is no "clear" answer, the arbitrator may return to traditional contract interpretation. One arbitrator states the requirement as follows:

> Under such circumstances...such a contract provision or obligation should not be upset in the absence of the clearest of indicators that such a provision is contrary to law.[180]

Where applicable law "has not been fully or finally determined," it may not be applied.[181] Also, an arbitrator may find that less than final court decisions or other than statutory language are not an adequate basis for a filing. Decisions of the NLRB[182] or of an investigative employee of a state agency[183] may not qualify as "law" for purposes of the contract.

In one particular area, the application of external law may produce a slightly different approach, one which may cause the arbitrator to look more closely at the content of the law. This area involves statutory changes made, after the negotiations, but during the life of the agreement. While there are very few cases reported, statutory law not in contemplation at the time of the signing of the contract may be a type of external law which warrants greater scrutiny by the arbitrator.[184]

Reasonableness and Fair Procedure

Introduction: The collective bargaining process is a form of bilateral decision-making (teachers union and school management) imposed on an area which was once largely characterized by unilaterial decision-making by the school management. Where arbitration is involved, collective bargaining is also the use of a third-person arbitrator to determine whether certain types of decisions are consistent with the contract. Determining whether the decisions are consistent requires the use of a general standard against which the decisions may be measured. The standard that is commonly used is one of "reasonableness" or "fairness." Other language may also be used, such as, due process, arbitrary, capricious, discriminatory, good faith, fundamental fairness, equitable procedure. The standard might be applied to personnel decisions covered by the contract, where the employer does not have an exclusive grant of authority. The standard might be applied to the substance of the decision (i.e., a "poor" evaluation was not merited on the facts, a paid leave should have been granted) or to the procedures (i.e., appropriate notice was not given, stated reasons for a personnel action were inappropriately withheld) or to both the substance and procedure.

Explicit Contractual Basis for the Reasonableness Standard: The easiest place to look for the standard is in the contract itself. The contract may provide that a decision, for example, must be based on "equitable standards."[185] Such language must be construed, and the arbitrator in the case stated:

> The purpose of the requirement is to ensure the appearance as well as the reality of fairness. Standards are not equitable unless they are reasonably related to the needs of the school, capable of objective ascertainment and applied in a fair and equitable manner. Notice to all teachers and a reasonable opportunity...to make known their claims are minimum procedural requisites...[186]

Another source of the standard may be found in the procedures for decision-making established by the school. One arbitrator described it in this manner:

> Theoretically, it could be argued that the Board has unrestricted discretion...but it has seen fit, in the exercise of its function of management, to evaluate coaches and set up a rating system. It is obligated, then, to administer that system fairly, reasonably, and without discrimination; it may not administer the system capriciously or arbitrarily.[187]

Another contractual basis of the standard may be found in a "just cause" provision. "Just cause" receives various definitions, as illustrated below:

> Transposing this concept of "just cause" to matters arising in education contracts, this arbitrator has recognized that in considering whether there was just cause and failure to renew a probationary teacher's contract, that if the Board has established standards of teaching and the teacher has been advised of the standards, and has been advised that he is not meeting the standards, and the Board has followed the procedures in evaluation, then just cause exists for the failure to renew.[188]

Another arbitrator states:

> For discipline to be for just cause, it must be shown that the recipients received due process, which includes the element of notice where possible of the likely reaction to a proposed course of conduct [i.e., not attending open house]. This is totally aside from the deterrent affect such notice may accomplish, thus avoiding disciplinary action in many instances.[189]

Implied Contractual Basis for the Reasonableness Standard: In addition to an express contractual statement of reasonableness, the arbitrator may imply such a requirement from the contract and collective bargaining relationship. This process is described by arbitrators in the following manner:

> Precisely because a principal has broad discretion... it is incumbent upon the principal to exercise that discretion reasonably and with proper regard to the consequences of his decisions. He is subject to the generally established constraints that he not be arbitrary, capricious, or discriminatory in the exercise of his authority.[190]

> (Contract stated "the Board of Education reserves the right to reject any and all requests for sabbatical leaves of absence." The Arbitrator stated:) Admittedly this language does not give the Board a carte blanche to reject all sabbatical leave applications. The Board cannot be arbitrary nor can it engage in discrimination in rejecting such applications.[191]

It would seem to be tremendously important that the parties take cognizance of the implied requirement of reasonableness. By recognizing its existence and following its dictates, both sides can help insure that personnel decisions are less likely to result in grievances, and where grievances arise, it may help to resolve them at the less expensive, faster pre-arbitral steps.

Elements of Reasonableness - Timely Notice: In order for the arbitrator to find a personnel action to be reasonable, it must be shown that the teachers were given adequate, advance notice of the school's required rules or standards of conduct. One arbitrator summarizes the matter as follows:

> In order to meet the tests of due process, disciplinary policy must be clearly stated and uniformly and consistently applied. The most effective disciplinary procedures provide for notices, warnings, and progressive penalties. In order for these policies to be applied successfully there are two fundamental prerequisites: the establishment of clear guidelines and standards within which supervisors throughout the line of supervision may make reasonable decisions with confidence that they will be upheld, and, secondly, the establishment of effective channels of communication which operate with sufficient regularity to provide adequate two-way communication between management and employees.[192]

Providing employees with notice through written rules is probably the safest and surest technique. Written notice may come by way of the contract. For example, if a condition is to be imposed upon the granting of a leave, it must be clearly stated in the contract.[193] Written notice may come through regulations published outside of the contract. One arbitrator states the matter this way:

> If a teacher is to be punished...the administration must be able to point to a definite, precise, published rule, of which the teacher was given advance knowledge and which she knowingly or carelessly violated.[194]

If the employee is handicapped, special efforts may be required to insure reasonable and timely notice.[195] Where written notice is inadequate, a subsequent conference or meeting with the affected group or individuals might be enough to meet the notice requirement.[196]

Notice must be timely, to give the affected teachers an opportunity to prepare, decide, and adjust to the new requirement.[197] Timeliness is particularly important, where a new rule or regulation is being promulgated, so that the teachers can have an opportunity to adjust.[198] Notice and timeliness are also important where a preexisting policy has lapsed and has been unenforced, but which the school administration now seeks to revive.[199]

A particular type of notice problem arises when general information is first requested, and subsequently is applied to specific cases. For example, a school distributed a questionnaire seeking information on teacher class preferences. Later those results were used to determine who would be laid off. At the time the questionnaire was distributed, the teachers had no notice that answers would be used to make layoff decisions; accordingly, the questionnaire results could not be used in the layoff context.[200] However, if the questionnaire or survey results did not have an impact on a particular individual, its use would be permitted.[201] Similarly, an arbitrator ruled that the denial of a sick leave request under the contract was improperly used to discipline a teacher with a bad attendance record. Among other things, presumably there was no notice of such potential use.[202]

Another facet of the notice issue relates to the use of long-past infractions as a basis for imposing present discipline, transfer, or evaluation policies. One arbitrator stated the matter in this manner:

> The principal had ample opportunity to indicate his concern on the evaluation form with the impact of Grievant's absences ...and had a clear obligation to do so if he felt it was important. When he failed to do so he in effect gave the Grievant every reason to believe her work was fine, her absences were not a problem and that there was no possibility she might be transferred to another position because of her absences.[203]

Where a teacher has committed an act which warrants administrative action, the arbitrator will require the school to give notice in a timely manner before taking action. If nothing is done by the school at the time, the matter may be held to be too stale to revive.[204] As one arbitrator said:

> ...it would deny the very function of a warning notice, i.e., that there be an opportunity to demonstrate that the lesson was learned, and that the infraction would not recur.[205]

Elements of Reasonableness - Opportunity to Tell One's Own Side: An important element of a fair or reasonable decision is that the aggrieved person be given an opportunity to rebut, defend, or tell their side of the issue. One arbitrator stated the matter as follows:

> More importantly,...(the principal) did not discuss the matter with the Grievant. Certainly,...(the teacher) should have been given the opportunity to tell his story. (the principal's)...statement that there was no reason to the Grievant since she saw him strike the student cannot excuse her denying him his basic right to defend himself.[206]

Giving the teacher an opportunity to rebut or defend is obviously related to notice and timeliness. One of the purposes of the timely notice requirement is to provide an opportunity for the teacher to persuade the school administrator, for example, that the evaluation is inappropriate or underserved.[207] If secret charges are brought against teachers, they are effectively denied an opportunity to rebut or defend. In such circumstances, arbitrators may find a violation of the reasonableness standard.[208] Similarly, fairness or reasonableness may be infringed where documents or sources of criticism are withheld from teachers so that they do not know of their content.[209]

Elements of Reasonableness - Adequate Investigations: Where the school administration seeks to deny a privilege or right, or seeks to take adverse personnel action, a reasonable decision requires an adequate investigation.[210] An inadequate investigation may result when an evaluation entry is based soley upon hearsay,[211] or where a superintendent acts "perfunctorily, without care or interest" on a transfer request,[212] or where administrators refuse to request additional information and simply deny a request.[213] A brief conversation without followup may be an inadequate investigation.[214] There may be a requirement that an evaluation investigation be conducted openly.[215] This standard, however, may be met so long as the information was not gained "surreptitiously, secretly, through unsubstantiated reports, by delegates unknown monitors, or by other clandestine or indirect means."[216]

Elements of Reasonableness - Opportunity to Correct: Particularly in evaluations which may lead to discharge or non-renewal, teachers should be given enough notice of the problems so that they have an opportunity to overcome the problems. One arbitrator stated the requirement in this manner:

> The purpose of Article XIV, on teacher evaluation, is not merely to require the District to observe the teacher, but to give the teacher an opportunity to learn of his or her deficiencies...and, most importantly, to "be given an opportunity and assistance to correct any deficiencies."[217]

To provide this opportunity, the teacher must know about the specific nature of the complaints.[218] The right of ample-opportunity-to-correct may be found in the contract. The obligation may be literally construed,[219] requiring suggestions for improvement "even where they are 'self-evident.'"[220]

Elements of Reasonableness - Other Requirements: Arbitrators suggest other possible requirements for a reasonable decision. One of these is the apparent requirement that the school official who makes a personnel decision should not be biased against the teacher. The suggestion is that the arbitrator may award the right to a redetermination if such bias is shown. The teachers' union frequently raises this issue, but it is noteworthy that it is rarely proved to exist.[221]

Another element that may render a decision unreasonable is where the school administrator gives one reason for the decision at the time, but later shifts to another basis as the rationale.[222] Similarly, where a school district leads a teacher to believe that a given course of action is proper, it cannot later penalize the teacher for taking such action.[223] In addition, where the school district has information it should have disclosed but did not disclose, the teacher may not be penalized.[224] However, where the union's action prevented the school district from acting in the proper fashion, however, the district may have a defense.[225]

Another requirement of a reasonable decision may be that the decision, particularly in evaluation cases, be based upon adequate factual findings or reasons. One arbitrator stated the matter as follows:

> It is not sufficient for the committee simply to state that it "considered" the applicants and found that one was "better qualified" than the others. The Committee must be prepared to demonstrate that the candidate who was selected was...better qualified.[226]

The requirement of a sufficient factual base may affect either the decision itself, or it may effect only the level of discipline imposed upon the teacher.[227]

Footnotes

1. 63 AIS 5. See also the "presumptive arbitrability of the grievance," 85 AIS 15.

2. 65 AIS 13.

3. 65 AIS 10. See also, 115 AIS 10; 96 AIS 14; 84 AIS 16; 79 AIS 10; 66 AIS 3.

4. 102 AIS 6; 66 AIS 16.

5. 101 AIS 1; 67 AIS 18.

6. 82 AIS 6; 50 AIS AB-7.

7. 69 AIS 20.

8. 62 AIS 10.

9. 89 AIS 7.

10. 68 AIS 19.

11. 48 AIS AF-9.

12. 88 AIS 21; 58 AIS AF-7.

13. 57 AIS AB-6; 56 AIS AJ-9.

14. 114 AIS 9; 104 AIS 11; 69 AIS 20.

15. 115 AIS 17.

16. 95 AIS 20.

17. 96 AIS 11.

18. 67 AIS 18.

19. 101 AIS 19; 101 AIS 6; 94 AIS 11; 67 AIS 12.

20. 60 AIS 11.

21. E.g., 77 AIS 6; 51 AIS AM-13.

22. 50 AIS AB-7.

23. 84 AIS 5; 71 AIS 1; 60 AIS 18.

Footnotes

24. 103 AIS 10.

25. 94 AIS 4.

26. 114 AIS 23.

27. 86 AIS 12; 63 AIS 7. See also 94 AIS 5.

28. 88 AIS 5.

29. 115 AIS 15; 114 AIS 11; 95 AIS 7; 81 AIS 21; 61 AIS 2; 49 AIS AD-4; 45 AIS AW-4. See also 59 AIS 11.

30. 91 AIS 14; 49 AIS A-17.

31. 59 AIS 11.

32. 82 AIS 9.

33. 87 AIS 3.

34. 115 AIS 15; 95 AIS 15.

35. 94 AIS 15.

36. 54 AIS K-1.

37. 97 AIS 1.

38. 85 AIS 13.

39. 86 AIS 8. See also 69 AIS 6; 58 AIS L-12.

40. See also 60 AIS 1.

41. 84 AIS 21; 67 AIS 8.

42. 79 AIS 15.

43. 91 AIS 10.

44. 98 AIS 10.

45. 49 AIS A-11.

46. 83 AIS 19; 66 AIS 22.

47. 47 AIS AF-8.

48. 97 AIS 14.

49. 44 AIS W-19. See also 107 AIS 14.

50. 49 AIS W-8.

51. 105 AIS 1.

52. 50 AIS W-14.

53. E.g., 86 AIS 3.

54. 89 AIS 22; 62 AIS 19.

55. 101 AIS 11.

56. E.g., 94 AIS 9; 85 AIS 11; 79 AIS 16; 78 AIS 17.

57. 90 AIS 14.

58. 68 AIS 7.

59. 94 AIS 17.

60. 98 AIS 5.

61. 106 AIS 22.

62. 65 AIS 6.

63. 78 AIS 7; 75 AIS 21.

64. 101 AIS 11.

65. 65 AIS 10.

66. 92 AIS 9; 89 AIS 15; 58 AIS L-12.

67. 98 AIS 21; 97 AIS 13; 96 AIS 12; 87 AIS 14; 79 AIS 4; 68 AIS 11; 68 AIS 6; 68 AIS 4.

68. E.g., Black's Law Dictionary, 63 AIS 1; private sector industrial analogy used, 96 AIS 4.

69. 92 AIS 14.

70. 62 AIS 17.

71. 114 AIS 22. For other formulations of the same rule, see 108 AIS 7; 77 AIS 12; 75 AIS 12; 62 AIS 19; 48 AIS L-4.

72. 51 AIS H-2. See also 50 AIS T-9.

73. 53 AIS AL-11. See also 84 AIS 20; 53 AIS W-8.

74. 114 AIS 22.

75. 82 AIS 5; 58 AIS L-12; 44 AIS J-2.

76. 107 AIS 2; 82 AIS 22; 82 AIS 5; 71 AIS 8; 58 AIS L-12; 44 AIS J-2.

77. 85 AIS 20; 84 AIS 17; AIS 15.

78. 61 AIS 2.

79. 113 AIS 17.

80. 43 AIS W-4.

81. 42 AIS AX-6.

82. 42 AIS F-12.

83. 79 AIS 2; 66 AIS 11.

84. 89 AIS 22.

85. 65 AIS 6; 59 AIS 5.

86. 89 AIS 22.

87. 89 AIS 6.

88. 66 AIS 11.

89. 102 AIS 4; 85 AIS 6.

90. 69 AIS 5.

91. 80 AIS 6.

92. 82 AIS 19. See also 68 AIS 5.

93. 54 AIS K-4.

94. 57 AIS AB-6.

95. 93 AIS 4.

96. 79 AIS 10.

97. 59 AIS 3.

98. 65 AIS 24.

99. E.g., 82 AIS 17; 82 AIS 19.

100. E.g., 102 AIS 6; 76 AIS 20; 59 AIS 3; 57 AIS AB-6.

101. E.g., 110 AIS 1; 79 AIS 19; 75 AIS 15; 63 AIS 17.

102. For a somewhat different statement of this approach, see 70 AIS 3.

103. 67 AIS 5.

104. 70 AIS 21.

105. 67 AIS 5.

106. 70 AIS 21.

107. 67 AIS 5.

108. 69 AIS 12.

109. 97 AIS 11.

110. 64 AIS 17. See also 115 AIS 18.

111. 87 AIS 20.

112. 87 AIS 20.

113. 112 AIS 16; 42 AIS J-11.

114. 114 AIS 3; 87 AIS 5; 64 AIS 17.

115. 77 AIS 13; 69 AIS 5.

116. 116 AIS 13; 112 AIS 21; 103 AIS 15; 98 AIS 8; 81 AIS 11; 81 AIS 9; 65 AIS 8.

117. 91 AIS 8.

118. 63 AIS 6. See also 102 AIS 7; 42 AIS W-1.

119. 98 AIS 2. See also 64 AIS 5; 43 AIS J-15.

120. 87 AIS 20.

121. 103 AIS 9; 73 AIS 5.

122. 104 AIS 19; 60 AIS 4.

123. 79 AIS 21.

124. 94 AIS 19.

125. 88 AIS 6; 65 AIS 1.

126. 114 AIS 18.

127. 65 AIS 25. See also 66 AIS 10.

128. 106 AIS 14; 99 AIS 17; 65 AIS 15.

129. 98 AIS 2.

130. 90 AIS 24.

131. 115 AIS 10. But see 106 AIS 11.

132. 76 AIS 17.

133. 76 AIS 2.

134. 81 AIS 9. See also 87 AIS 20; 64 AIS 2.

135. 109 AIS 15. See also 116 AIS 5; 110 AIS 15; 102 AIS 6; 94 AIS 16; 81 AIS 11; 76 AIS 8.

136. 102 AIS 9; 101 AIS 4; 99 AIS 21.

137. 90 AIS 4; 82 AIS 13; 78 AIS 13.

138. 90 AIS 8.

139. 44 AIS W-18.

140. 82 AIS 1.

141. 80 AIS 6.

142. 82 AIS 8. See also 81 AIS 21.

143. 58 AIS D-8.

144. 106 AIS 23.

145. 94 AIS 16; 75 AIS 11.

146. 77 AIS 13.

147. 47 AIS AF-8.

148. E.g., 91 AIS 9. See also 84 AIS 21.

149. E.g., 88 AIS 22.

150. 104 AIS 7.

151. E.g., 104 AIS 7; 100 AIS 4.

152. E.g., 116 AIS 11.

153. E.g., 100 AIS 22.

154. E.g., 102 AIS 6; 76 AIS 16.

155. E.g., 89 AIS 9; 113 AIS 20; 89 AIS 9.

156. E.g., 105 AIS 12.

157. E.g., 100 AIS 12; 89 AIS 4; 49 AIS W-9. But compare 100 AIS 9; 89 AIS 11.

158. E.g., 81 AIS 17.

159. E.g., 108 AIS 12; 58 AIS D-8.

160. 97 AIS 11.

161. 114 AIS 8. See also 78 AIS 13.

162. 98 AIS 20. See also 113 AIS 4.

163. 81 AIS 8.

164. 81 AIS 8.

165. 110 AIS 1.

166. 101 AIS 12.

167. 64 AIS 15.

168. Party agreement, 81 AIS 19; "unique," 82 AIS 20; other reasons 108 AIS 21; 84 AIS 17; 60 AIS 18.

169. 113 AIS 10. See also 112 AIS 6.

170. 114 AIS 15; 107 AIS 17; 102 AIS 19; 93 AIS 12; 76 AIS 15.

171. 99 AIS 10.

172. 90 AIS 2. See also 103 AIS 8; 103 AIS 1; 88 AIS 20; 87 AIS 11; 76 AIS 15; 65 AIS 21.

173. 103 AIS 8; 66 AIS 5.

174. 98 AIS 18; 98 AIS 8; 93 AIS 17; 85 AIS 17; 85 AIS 6.

175. 76 AIS 4.

176. 91 AIS 9. See also 108 AIS 3; 103 AIS 10; 84 AIS 19.

177. 109 AIS 7; 92 AIS 10; 74 AIS 10; 60 AIS 18; 58 AIS AF-7.

178. 84 AIS 9.

179. 92 AIS 14.

180. 102 AIS 5. See als0 87 AIS 8.

181. 11 AIS 18. See also 109 AIS 7; 84 AIS 17.

182. 88 AIS 24.

183. 107 AIS 19.

184. 95 AIS 16; 62 AIS 13.

185. 63 AIS 19.

186. 63 AIS 19.

187. 101 AIS 11.

188. 43 AIS BD-7.

189. 41 AIS D-2.

190. 79 AIS 18.

191. 46 AIS L-1.

192. 68 AIS 16.

193. 88 AIS 10.

194. 69 AIS 16. See also 107 AIS 17; 71 AIS 22.

195. 113 AIS 8.

196. 69 AIS 4.

197. 87 AIS 11.

198. 99 AIS 17; 98 AIS 10.

199. 78 AIS 12.

200. 115 AIS 3.

201. 83 AIS 16.

202. 69 AIS 2.

203. 111 AIS 13.

204. 111 AIS 2; 61 AIS 6; 60 AIS 12.

205. 102 AIS 17.

206. 112 AIS 2.

207. 114 AIS 6; 110 AIS 7; 107 AIS 16.

208. 99 AIS 1; 76 AIS 19.

209. 105 AIS 6; 93 AIS 6.

210. 95 AIS 9; 60 AIS 12; 43 AIS D-14.

211. 53 AIS KM-15.

212. 89 AIS 9.

213. 48 AIS L-4.

214. 79 AIS 5.

215. Contract requirement, 72 AIS 11; general requirement, 114 AIS 1.

216. 114 AIS 1. See also 112 AIS 12.

217. 66 AIS 3.

218. 107 AIS 17; 101 AIS 11; 87 AIS 17.

219. 101 AIS 13; 83 AIS 7; 62 AIS 13.

220. 106 AIS 24.

221. 103 AIS 21; 98 AIS 12; 98 AIS 7; 97 AIS 10.

222. 62 AIS 14.

223. 106 AIS 6; 90 AIS 15; 45 AIS L-13.

224. 106 AIS 23.

225. 78 AIS 19.

226. 79 AIS 19.

227. 63 AIS 16; 60 AIS 11.

SCHOOL ARBITRATION: WHAT THE ARBITRATORS ARE DOING

Chapter 3 - Budgets

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Introduction

The beginning of the 1980's is a difficult time for public employers and public employees, in general, and schools and teachers, in particular. A triple punch blow includes a taxpayers' revolt, economic recession combined with high inflation, and, for schools, the prospects of declining enrollments. Budget considerations lie at the heart of many school-employer decisions, and it would be difficult to clearly separate grievances that had a significant budgetary overtone from those having minimum budgetary overtone. The authors identified a number of grievances that appeared to focus primarily on financial issues. The basis for judgment was largely the extent of the arbitrator's discussion of the budget issue. Where the discussion put considerable emphasis on the budget matter, it was included in the collection of cases used in this chapter. As a result, about 9 percent of the cases studied fit the category. It is believed, however, the importance of the issue is greater than that number might indicate.

The numbers of cases in this subject heading are relatively small, and one should consider that number in evaluating any conclusions based on them. Somewhat more class grievances (2 or more persons) were filed than individual grievances. Looking at the individual grievances filed (again a relatively small number), twice as many involved individual females as involved individual males. Part of the reason may lie in the greater number of female teachers. Part of the reason may lie in the nature of the relatively small numbers in the sample.

Grievances involving budgets may have an unusually broad impact. When the budget is involved, the impact of the controversy may logically spread to include more than the school district. For example, a town council may have authority over the schools. Where a significant budgetary award is involved, action by the council may be involved, which in turn might involve the community taxpayers. In addition, there may be a need to refer to external law in the form of court decisions and external statutes governing budgets.

Budget issues come in varying degrees of intensity or severity. First, is the school district that desires to change its priorities in spending money and reduce money in one category and increase it into another. Second, is the school district that may wish to curtail its overall spending for political or other reasons. Third, is the school district that has lost a budget election and inevitably faces a reduced budget in the future. Fourth, is the school district that faces immediate bankruptcy or cash shortage. The terms of the collective bargaining agreement may limit the school's ability to meet these goals. When the parties prepare for a grievance hearing, involving one of these situations, it will behoove them to clearly identify the factual nature of their budgetary position and to insure that they have facts to support that position. The actual degree of the budgetary stain may be an important element in the determination of the outcome. The provable level of strain will be more important than fears or predictions about the future.

Management Rights: Interpretation of the management rights clause may cause geater concern in budget cases than in some other cases. As an overall beginning, the school employer has no inherent right to abrogate the contract based solely upon management's view of the budget. Generally, a school employer has no more right to abrogate the collective bargaining contract than any other contract. However, this rule does not preclude the possibility of some management right in a particular circumstance. One arbitrator stated the matter in this way:

> The estimate of the Town's financial condition or the desire to effect economies and reduce the cost of government...cannot be regarded by the Arbitrator as a basis for ignoring its 1974-77 contractual commitment.[1]

Another arbitrator has stated it in this way:

> Absent a clause in the contract allowing the district to make unilateral changes when budget problems arise, the district must honor its contract commitments, regardless of its money problems....
>
> There are numerous decisions from the New York State Court of Appeals to support the arbitrator's position on this point. The courts have generally held that unless the point at issue is against public policy, the parties are bound by their agreement. The courts have warned... school boards to look down the road....[2]

Balanced against these rules is the overall right of the employer to direct the program and, therefore, to direct the budget. When an employee is laid off, the immediate impact on the employee is the same whatever the reasons for the layoff. From the point of view of the arbitration hearing, however, the reason for the layoff may make a substantial difference. The teacher may be laid off because of the elimination of a program, or department, or a facility. Such a case involves the school district's "business" judgment. Such a decision to alter the "method of production" is a typical area of management prerogative. One arbitrator viewed it in the following manner:

> Arbitrator Short pointed out that management may eliminate jobs and reallocate the remaining duties when such action is done in good faith and for a justifiable purpose. Management has demonstrated that the changes were made in good faith and based upon legitimate business considerations.... The Federation has not shown any sham, subterfuge or improper motives in the actions of the Board.[3]

In another type of budgetary dispute, a teacher may be laid off because of a general reduction-in-force (RIF) that still leaves the school's program or departmental structure essentially untouched. Such a process may involve weighing a teacher's strengths and weaknesses when making a discharge decision. Here the arbitrator may apply a reasonableness standard when reaching the decision. One arbitrator stated it in this fashion:

> When the qualifications of teachers are evaluated, the Employer must always apply fair and reasonable standards --even in the application of "judgement and discretion"-- and may not act in an arbitrary and capricious manner or in any way which discriminates against an individual employe.[4]

Either type of decision, a program change or an individual by individual RIF, may have the identical effect of reducing the overall budget. It is likely, however, that the arbitrator will be less able to effectively analyze the factual basis of a program change than to probe the facts supporting an individual discharge in the RIF situation.

Budget Strategies

Introduction: Budget problems might be seen as an immediate problem or may be perceived as a prospective event to be anticipated and avoided. Programs may be put in jeopardy. Personnel may have to be reassigned or terminated. Strategies must be developed to cope with the situation. There are a variety of responses that can be made. This section looks at some of the strategies that have been the subject of grievances.

Budget Strategies - Individual Contracts: The union contract may be viewed as essentially a fixed cost. If more personnel are hired under the contract, the collective bargaining agreement will set the rate and increase the fixed costs. However, if a teacher can be hired under an individual contract, a lower wage or lower cost fringe benefit might be paid. In order to justify such a hiring, the position would have to be one that is outside of the collective bargaining unit and, therefore, outside of the collective bargaining contract. When school district employers attempt to hire employees under individual contracts, a grievance can arise. The union will argue that the position is one that should properly be within the unit and thus be covered by the terms of the collective bargaining contract. Thus, where the collective bargaining contract covers all "full-time" teachers, the strategy may be to attempt to bring the new teacher in as a "substitute," not covered by the regular, full-time teacher agreement. The arbitrator's task is to determine whether the teacher is, in fact, in a different category than unit members. Determination of the definition of the unit will be a critical element in this type of case.

In one such case, in which a "substitute" was hired to replace a teacher who has permanently left the school system, one arbitrator ruled that the new teacher was in the unit and was, therefore, covered by the contract. She had a full-time teaching load and had the same schedule as full-time, regular teachers.[5] Where the contract covered "all certified teachers employed," a 3-day per week music teacher was also included. The teacher was more like a regular teacher than a substitute.[6] In large part, the determination of who is covered by the contract (i.e., the unit) and who is not covered is determined by the definition included in the recognition clause.[7] Finally, teachers not hired for the full year may not come within the terms of the contract.[8]

Another attempt to avoid the terms of the contract may involve the source of funding for a position. For example, where federal funds are a major source of income, it may be argued that positions so funded are outside of the unit. In one such case, the contract provided that aides would work for six hours a day. The union argued that contract rights are not affected by the source of funds. The school sought to reduce the aides' hours and cited the source of funding as the basis for not applying the contract. The arbitrator ruled, however, that the contract provided a minimum and its scope could not be altered simply because federal funds paid for the position.[9]

Budget Strategies - Changing Priorities: A fiscal crunch may be seen by the school employer as a situation requiring new educational priorities and, therefore, new budget priorities. The employer may then argue that the contract does not apply to the new situation arising after priorities have rejuggled. The union will argue that to the extent that the contract reflects existing priorities, a mere desire to restructure the spending pattern cannot alter contractual rights. One arbitrator stated the following:

> The plea to be excused from contractual obligations because of a fiscal crisis, however, must be addressed to a court, not to an arbitrator. The courts have the authority to override contractual rights on the basis of supervising policy, for they can weigh the public interest in the sanctity of contracts against the public interest threatened by enforcement of the contract. The arbitrator has no such authority. His authority is rooted in the contract.[10]

Another arbitrator, stating essentially the same rule, indicated that the school at that point should "request the renewal of negotiations with the Association."[11] Another arbitrator stated:

> Having negotiated a benefit, the school committee cannot retract it unilaterally, even if in its judgment other programs would have greater educational value for the school system.[12]

Similarly, another arbitrator stated:

> The Board's problem here was not one of poverty but of mistaken priorities. The funds were not lacking, but only an unwillingness to use them to pay these teachers, or more accurately, a preference to pay them to the other teachers.[13]

The "new" priorities often involve less than fundamental reorganization. Programs may be renamed, but the staff may remain essentially unchanged and their duties may be essentially similar. In such a case, the contract will usually be found to apply. However, if a bona fide change in basic organization is made that is not prohibited, the result could be different.

Budget Strategies - Subcontracting: When budget problems come, another strategy to reduce costs may be to subcontract some of the school services. A savings may result if the subcontractor performs the work at less cost than teachers or other unit employees. This means a possible loss of individual jobs and possibly the overall loss of unit work for teachers or other school employees. The union may argue that the work under the subcontract is of the same quality and quantity of that previously performed by unit members, or that the contract restricts the right to subcontract. A number of subcontract issues have gone to arbitration, particularly involving the teaching of driver's education, the operation of the cafeteria, and custodial services.

Arbitrators, relying on private sector precedents, have some well-developed approaches to subcontracting. One arbitrator identified three different approaches to the problem:

> In earlier cases, Arbitrators held that management had the right to subcontract...unless this right was specifically restricted by the collective bargaining agreement, or the subcontracting was done in bad faith.
>
> Other arbitrators have held that the recognition clause places an implied restriction upon the employer in exercising his right to subcontract.
>
> A third view recognizes that the basic problem involved...is that of maintaining a proper balance between the employers legitimate interest in efficient operation of his business...and the Union's legitimate interest in protecting the job security of its members and the stability of the bargaining unit.[14]

Another arbitrator identified a criteria by which one might measure a subcontract. The criteria included, in abridged form, the following:

1. Must not be intended to deprive a substantial number of bargaining unit employees of work.
2. Conforms to past practice not previously objected to and may not be instituted as a new practice.
3. Must be in good faith and not in an effort to subvert the agreement.
4. Must not evade substantial provision of the agreement, nor violate its spirit, intent, or purpose.
5. Must be dictated by efficiency, economy, or expeditious performance.
6. May not be unreasonable, arbitrary, disciminatory, nor intended to harm, prejudice, or undermine the union.[15]

The contract may either permit or limit subcontracting. A contract providing that work would be done by unit employees "where feasible" was interpreted to mean where economically feasible. In that case, the cafeteria was losing money and consequently the subcontract was permitted.[16] In another contract involving bus drivers, it was held that the overtime provisions precluded subcontracting field trips going beyond the regular bus runs.[17] Presumably, the employer had agreed to pay overtime for extra driving, thus limiting the employer's right to give the work to a subcontractor.

Drivers' education programs have been the subject of grievances on subcontract issues. In one such case, an arbitrator found that the union had waived the issue during negotiations, and permitted the employer to subcontract services.[18] Another arbitrator permitted a subcontract of a course where the other alternative was total elimination of the program.[19] A variation on the subcontract theme was unsuccessfully tried by one school district. There the school negotiated the cost of the driver's education course with the individual instructors instead of with the union. The arbitrator thought because the program was previously taught in the same manner, the school district's attempt to subcontract was a subterfuge and a violation of the contract. It was taught during school hours, contained the same subject matter as before, and involved the same student population.[20]

An interesting and more complex situation gave rise to another subcontract issue. The school district hired a consultant to set up new programs for handicapped students pursuant to statutory mandates. Part of the package was a specialist teacher who was performing work similar to the work of the special education teacher in the bargaining unit. The union grieved the infringement on unit work. The arbitrator held that during the first year of the consultative contract there was no violation because it was essentially a new program. The arbitrator alluded there might be a possible violation during the second year of the consultative contract if the individual in question was engaged primarily in teaching and only incidentally in consultation.[21]

In a somewhat related situation, a school district hired four teachers for less than a full year under a federal program. The teacher's union argued that the contract covered the teachers (i.e., they were in the unit) and, accordingly, the teachers should have been hired for a full year and receive all contract benefits. Under the circumstances, the arbitration ruled that it was a de minimus violation and permitted the employer to hire on the basis of individual contracts.[22]

An unusual issue was raised when a school district stopped supporting evening adult classes and put them on a self-sustaining basis. The union claimed that this involved a change in funding, a type of subcontract, and that the contract had been violated. The arbitrator, however, found that the change effectively terminated the authority of the school district, resulting in the creation of a totally independent entity. Consequently, absent any evidence presented by the union indicating evasion or subterfuge,[23] the union would have to deal with the new entity as a new employer.

Budget Strategies - Extra Duties: Extra duty grievances are considered at some length elsewhere. It might be useful, however, to consider some of the cases in the particular context of budgetary problems. A School district might take on extra duty approach as a strategy to help a strained budget. Some such approaches include releasing assistants or aides not covered in the contract, increasing class size and reducing fringe benefits. Extra duties mean work that must be done in addition to the usual routine. This work may be an opportunity to do after-school jobs for which the teacher will receive extra pay. The budget strategy may be to eliminate the after-school job opportunities affecting the budget.

One response to a shortfall in the budget is for a school district to stop hiring substitutes. One arbitrator prohibited the use of the strategy and made the following observation:

> It may very well be that in a true emergency the Superintendent has the power and, yes, even the duty, to take whatever steps are necessary to continue.... However, the claim by the Superintendent that funds were not available to hire substitutes does not, per se, make for any emergency, since the lack of funds was predictable and other remedial alternatives might have been available. Since neither the Arbitrator nor the parties themselves can unilaterially alter or amend the contract, the Superintendent erred when he did not discuss the options or alternatives with the teachers....[24]

Other contracts may permit the use of discretion in determining whether substitutes are hired. The clause "the employment of substitute teachers is authorized when classroom teachers...are absent" was read as giving that discretion when financial problems arose.[25]

Elimination of teacher aides might be another approach to the budget problem. Where the contract read "no teacher shall be denied a professional advantage once he or she has enjoyed it," an arbitrator ruled that the traditional level of assistance from aides must be maintained.[26] Where there was no such protective language, the result was opposite. In the illustrative case, the teachers argued that the loss of aides meant a substantial change in working conditions which violated the contract. The arbitrator disagreed with the teachers because the work load increase was not that subtantial.[27] In a related case, the contract provided that when class size reached a certain point, the district could allievate it by adding teaching staff or aide staff. The district chose the hiring of less expensive aides and the arbitrator ruled that the choice was properly within the school district's discretion.[28]

Increasing class size may be another way of attempting to meet a budget problem. Where the contract specifies a maximum size, the arbitrator may find a violation where that number is exceeded. The budget will not be a defense,[29] except possibly in a true emergency. Where the contract sets a standard in terms of "desired" maximum class size or requires "reasonable efforts" to maintain class size, the surpassing of the stated goal because of budgetary constraints may not violate the contract.[30] Similarly, where a contract provides for a specific number of preparation periods, the arbitrator may read the contract as not permitting any reduction. This might necessitate the employment of others, such as, special subject teachers to provide for release of regularly employed teachers.[31]

Elimination of a costly extra duty might help alleviate a budget problem. Extra duties may be untenured assignments which are unprotected by the contract.[32] All that may be required is that the union be given notification of the school's policy.[33] Special leaves may also be subject to cancellation,[34] requiring the teacher to remain in the classroom, and avoiding the need to hire substitutes.

Budget Strategies: Reduction-in-Force: A common strategy to obtain budgetary relief is to reduce the number of employees. Where a reduction in force occurs, it may be measured by a good faith or reasonableness standard in arbitration. The school may not be permitted to abolish a position and discharge the occupant, then change the name of the position (keeping its old job description) and reopen it at a reduced wage.[35] Similarly the school may not be permitted to abolish a position under the guise of saving money and establish other more costly positions.[36] Where positions in the collective bargaining unit (full-time teachers) are abolished, and similar positions created outside of the unit (e.g., "permanent substitutes"), an arbitrator may find that the new positions are in fact a part of the unit, and covered by the contract.[37] In addition, while the budget problem can be the basis of the discharge, it should not be permitted to be used as a subterfuge to eliminate an unruly teacher.[38]

A reduction-in-force may give rise to seniority issues. The contract may provide for layoffs based on longevity, the new teachers being the first to be laid off.[39] The scope of the seniority protection must then be identified. Seniority could be measured system-wide, or school-wide, or only department-wide.[40] Where it is measured by seniority within a position, and the position is abolished, there may be no seniority protection.[41] In some situations seniority may be _the_ basis for determining the order of layoff, in other situations seniority may merely be _a_ basis for determining the order of layoff.[42] Where the school exercises a discretionary judgment, it may be subject to a reasonableness review.

Related to the reduction-in-force issue is the transfer issue. A teacher may be transferred into a position that is later abolished. The teacher may feel that he or she was being "set-up." One arbitrator stated:

> The District is not...obligated to transfer or retain tenured teachers in positions it does not want them to fill solely for the purpose of minimizing the effect of the reduction in force on other tenured teachers.[43]

In a reduction-in-force situation, contract requirements, such as notice must be followed.[44] Elimination of positions, however, may not give rise to use of the "just cause" provision. "Just cause" issues may arise where competence and qualification of particular teachers are involved, but not necessarily where the position is being terminated.[45] Unions frequently attempt to tie the "just cause" provision to any termination.

Where a position is being changed, there may be a duty in some situations to negotiate the impact of the change,[46] but not the decision to make the change. Contract language must be carefully reviewed, as several decisions may be involved. The parties may agree to negotiate the decision to make a change, agree to negotiate the impact of the alienation, unilaterially made by the school, or, agree only to give notice of such a change.

When attempting RIFs, contracts may limit the number of possible discharges. However, if the contract does not provide for a minimum number of work hours, the school may be permitted to reduce the hours of employees sufficiently to have the same net budgetary impact as a discharge.[47]

When a teacher is terminated or nonrenewed, the reasonableness of the particular decision may be reviewed under some contracts.[48] However, the arbitrator may not be in a position to redetermine the priorities that the school district has made in determining whether certain positions will be kept or eliminated.[49] The arbitrator may be willing to review the reasonableness of the application of the policy decision, but may not feel empowered to review the underlying policy itself, absent contract restrictions.[50]

In addition to terminating positions for lack of funds, a school may decide not to fill new or vacant positions for lack of funds. Where the school retains the discretion to fill or not fill the empty position, it may act accordingly.[51] The contract, however, may make the filling of some positions mandatory, for example, when it says that the district "shall appoint."[52] A district may, by contract, have agreed to "make every effort" or "take reasonable steps" to maintain or fill certain positions. Language of this type may permit an arbitrator to review the reasonableness of the school's actions, but may not require the district to fill the position in question.[53]

Budget Strategies and Recall Rights: When a reduction-in-force has occurred, it may trigger a recall provision in the contract. When the school employer begins to rehire to fill the empty positions, a number of issues may arise. The recall provisions involve the potential rehiring of more experienced and more expensive teachers than if the school were to hire untenured teacher replacements. If teachers can be hired outside of the unit, the employer may save some of the cost of providing a full package of fringe benefits to teachers covered by the contract. The administration of the recall provision has lead to a number of arbitration cases. Some contracts may distinguish between discharge and non-renewal. Recall may apply to discharge but not to non-renewal.[54] The contract may provide that the recall offer must be exercised by the teacher within a limited period or it will be lost. That limitation in the recall provision may be interpreted, however, as applying only to a position of a permanent nature, and not to a short term or temporary position.[55] A recall provision must be found in the contract, it will not be implied.[56]

The exercise of the recall provision may raise certain issues. A school district was not permitted to use "permanent substitutes" rather than recall teachers whose positions had been abolished.[57] Recalled teachers may be entitled to the benefit of all of the other provisions of the contract, such as new notice in the event that the budget problems persist and a second layoff is required.[58] The discretion not to recall a teacher, but to hire a different teacher based upon the comparative skills of the two is subject to review for reasonableness. As one arbitrator stated:

> I find that failure to rehire the Grievant...(whose positions) were filled...by non-tenured teachers...without a specific finding that (Grievant) was not qualified... was in violation of...the agreement.[59]

Another arbitrator stated:

> When the qualifications of teachers are evaluated, the employer must always apply fair and reasonable standards - even in the application of "judgment and discretion" - and may not act in an arbitrary and capricious manner or in any way which discriminates against an individual employe.[60]

Budget Strategies: Miscellaneous Strategies: A public employer cannot unilaterally amend its collective bargaining agreement, except possibly during a bona fide fiscal emergency. Not every budget crisis will qualify as a fiscal emergency.[61] A school employer who unilaterally eliminates all or part of the fringe benefit payments may be found to be in violation of the contract.[62] The violation is more likely to be found where the nonpayment results from a shift in priorities of available funds, as opposed to an absolute cash shortage. The relevant consideration is what the contract requires. A school employer who refuses to fund sabbatical leaves because of financial exigency may be found to be in violation of the contract where the contract specifies permissable reasons for refusing sabbatical leaves but does not specify that financial considerations may be the basis for the denial of a leave.[63] When a sabbatical leave is denied, it must be denied only on the basis of the contractually recognized reasons. Other leaves or the payment of conference expenses may be treated in a similar manner.[64] Finally, where a contractually permitted moratorium on expenses is permitted, the administration of the expense moratorium must be done in a reasonable manner.[65]

Awards

A school board with fiscal problems may take action to attempt to remedy the situation. At a later point, an arbitrator may rule that the action was improper. The arbitrator's award may include a remedy that arguably may put an additional burden on the school. In such a circumstance, one arbitrator stated:

> The arbitrator is not impressed with or persuaded by the defense of unappropriate funds. The Committee was put on notice back on April 14, 1977...(it is now 27 March 1978) or thereabouts, that this case was going to arbitration. Prudent management would have recognized the possibility of losing that arbitration and facing a monetary award.... Admittedly, the Committee was not obligated to act prudently in this regard, but certainly it cannot be heard to use its own failure as a defense.[66]

A school district cannot unilaterally abrogate its contractual obligations. Where the need to change operations occurs, however, the arbitrator may rule that the school's relief might come from a request to the teachers' union to open negotiations.[67] Whether the union will be under a legal obligation to reopen negotiations during the life of a contract may be a matter of both policy and external law as applied by the public labor agency.

When a school has engaged in the improper subcontracting of unit work, the award will often consist of a return to the status quo.[68] This type of award may require the reinstatement of laid off personnel, the issuance of back pay, or some combination of the two.[69] Where the contract violation is the improper imposition of extra duties, the award may involve payment for work done, restoration of the prior status quo, etc.[70] Where the awards include reinstatement or transfer of personnel, the arbitrator may delay imposition of such personnel moves so that they coincide with term or year changes, in order to avoid imposing hardship on the students and the school.

Conclusion: Budget crisis cases present difficult issues for parties in arbitration. It seems reasonably clear that in most situations, short of a true "crisis," the contract remains enforceable as written. It also seems reasonably clear from the cases studied that most financial binds are not a "crisis" which gives the school district a recognized defense before an arbitrator. One arbitrator summarized a budget crisis situation in this manner:

> It requires the Board to plan ahead if its action is to modify or terminate existing employment relations.... The right of the Board to manage carries with it the responsibility to manage....[71]

Budget crisis decisions often go to the heart of the collective bargaining process. Some budgetary disputes involve the equitable treatment of employees, others represent a challenge to the structure and operation of the collective bargaining unit. Where the school administrator seeks to circumvent the union and obtain individual contracts, the union predictably resists the efforts. Similarly, where the actions of the school employer might reduce the size of the unit or the overall amount of work available to the unit, a similar resistance by the Union is likely.

Footnotes

1. 76 AIS 23.
2. 102 AIS 3. See also 116 AIS 2; 112 AIS 20; 81 AIS 3.
3. 112 AIS 16.
4. 107 AIS 19. See also 115 AIS 8; 80 AIS 2; 70 AIS 16; 52 AIS Y-9.
5. 77 AIS 6.
6. 96 AIS 14.
7. 101 AIS 2.
8. 94 AIS 5.
9. 100 AIS 17.
10. 81 AIS 20.
11. 82 AIS 19.
12. 82 AIS 19
13. 81 AIS 20.
14. 50 AIS KX-13.
15. 93 AIS 11. See also 50 AIS KX-13.
16. 71 AIS 20.
17. 88 AIS 12.
18. 85 AIS 6.
19. 109 AIS 9.
20. 80 AIS 13.
21. 115 AIS 17.
22. 94 AIS 5.
23. 99 AIS 20.

24. 47 AIS G-6. See also 55 AIS W-7.

25. 80 AIS 15.

26. 102 AIS 3.

27. 83 AIS 13.

28. 104 AIS 24. See also 98 AIS 14; 43 AIS K-11.

29. 94 AIS 13; 75 AIS 22. See also 76 AIS 23.

30. 94 AIS 14.

31. 77 AIS 1. But see 94 AIS 15.

32. 84 AIS 3.

33. 75 AIS 8.

34. 104 AIS 16.

35. 84 AIS 2. See also 70 AIS 20.

36. 70 AIS 16.

37. 109 AIS 8.

38. 105 AIS 13.

39. 75 AIS 17.

40. 105 AIS 11.

41. 105 AIS 20.

42. 115 AIS 8.

43. 98 AIS 7. See also 71 AIS 21.

44. 81 AIS 20; 70 AIS 20. But see 89 AIS 8.

45. 104 AIS 4; 84 AIS 3; 80 AIS 7.

46. 90 AIS 23.

47. 99 AIS 23.

48. 104 AIS 14; 72 AIS 18.

49. 104 AIS 4.

50. 114 AIS 5.

51. 84 AIS 3.

52. 80 AIS 5.

53. 104 AIS 4.

54. 110 AIS 3.

55. 78 AIS 6. See also 112 AIS 7.

56. 52 AIS Y-9.

57. 89 AIS 13.

58. 87 AIS 16.

59. 87 AIS 2.

60. 107 AIS 19.

61. 116 AIS 2.

62. 112 AIS 6. See also 75 AIS 5.

63. 73 AIS 24.

64. 96 AIS 17.

65. 72 AIS 19.

66. 101 AIS 17.

67. 82 AIS 19.

68. 115 AIS 17.

69. 105 AIS 13; 75 AIS 17; 70 AIS 22; 70 AIS 16.

70. 94 AIS 13; 55 AIS W-7.

71. 81 AIS 20.

SCHOOL ARBITRATION: WHAT THE ARBITRATORS ARE DOING

Chapter 4 - Discrimination

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Introduction

The concept of discrimination has come to have a specific meaning in the statutory law. It relates to the inequitable treatment of individuals because of their membership in a class which is protected by the law. For example, if a job candidate is denied a job because the candidate is black, the candidate has experienced inequitable treatment because of membership in a class of black people. This class is protected by laws, such as Title VII of the 1964 Civil Rights Act, prohibiting race discrimination. Denial of the job on this basis may violate the law.

A related, but different concept is affirmative action. Affirmative action is the taking of positive steps to remedy the effects of past discrimination. This may include a plan for seeking out members of the underrepresented class and bringing them into the work force. Non-discrimination is distinguishable from affirmative action because it does not require positive, aggressive steps to bring the underrepresented into the work place. Rather, it is a neutral policy or practice of employee selection which requires that all employees be treated equitably, based on their job qualifications.

The following chapter examines the issues of discrimination and affirmative action primarily in the ways in which they become an issue in the school arbitral process, and examines the remedies which have been granted for such a violation of the contract. Surprisingly few awards in the school series concerned issues of discrimination. Of the 840 most recent awards isolated for analysis only 79, or 8 percent of the cases involved issues of discrimination. However, the issue of discrimination may be one increasing importance in the future. A twelve month period of arbitral decisions in the school series in 1973 contained only three cases discussing discrimination issues, while the most recent twelve month period of arbitral awards contained 22 cases discussing discrimination issues. Consequently since the analysis began in 1973, issues of discrimination in arbitration have increased in number, as well as, increased in the sophistication of their reasoning[1] and broadened in the scope of the arbitrator's award.[2] It seems reasonable to predict this trend will continue as grievants become aware of their rights and options, and as schools increasingly attempt to meet affirmative action mandates.

Forums

Alternatives for Resolving Discrimination Disputes: The use of the arbitral process to resolve a discrimination dispute is but one of several forums available to an aggreived party. Other options for filing a discrimination complaint include: (1) state or local level fair employment practices commissions, (2) a variety of federal agencies, including the Equal Employment Opportunities Commission, and (3) the court system.

It is possible to go to more than one of the above forums for resolution of a single dispute, assuming that the appropriate time for filing the complaint can be met. For example, claims filed with the Equal Employment Opportunities Commission must be filed within 180 days, while arbitration filing periods may be shorter.[3] The United States Supreme Court has recognized the right of aggrieved claimants to seek multiple remedies in discrimination disputes. The Court declared that prior resort to arbitration did not constitute an election of remedies, or waiver, of the right to judicial relief.[4] In the case, an employee had been discharged for "poor work," which he challenged through the grievance mechanism in the contract. The arbitrator sustained the discharge stating it was based on just cause. The employee raised the claim of race discrimination in arbitration, but the arbitrator did not discuss the issue in reaching the decision. The United States Supreme Court said that an employee's rights under Title VII and under the labor contract are of "distinctly separate nature" and entitled to separate vindication.[5] As a result, grievants may file a complaint of discrimination under the contract and proceed to arbitration and, in addition, file a statutory claim.

However, caution is advised when interpreting the Supreme Court decision. In a footnote in the decision the Justices wrote as follows:

> Furthermore, if the relief obtained by the employee at arbitration were fully equivalent to that obtainable under Title VII, there would be no further relief for the court to grant and hence no need for the employee to institute suit.[6]

It seems possible that grievants, who have obtained relief or received equivalent procedures in arbitration for a discrimination dispute, could have their claim for relief dismissed in court because the judge believed that the arbitrator's award constituted sufficient remedy for the claim.

In response to the existence of multiple procedures for resolving discrimination claims, some contracts have incorporated "election of remedy" provisions. An example of what an arbitrator termed an "election of procedures" clause reads as follows:

> Restrictions: If the employee files any grievance in any form other than under this procedure, then the District shall not be required to process the same claim or set of facts under this procedure.[7]

An arbitrator went on to interpret ambiguous words in the above clause to mean:

> Therefore, the first sentence of Section 27.3 represents a bar to the grievance procedure where the Grievant elects to seek relief from a procedure other than the procedure provided for in the Agreement.
>
> The foregoing finding represents an election of procedures in the first instance, that is, where the grievant elects to use a procedure provided by a jurisdiction other than the procedure under the Agreement, then the District may refuse to process the same claim or set of facts; however, where the grievant elects the procedure of the Agreement and processes his or her claim under that procedure, then he or she may proceed to another procedure if he or she so elects.[8]

Consequently, there are ways of limiting a grievant's use of multiple remedies. However, the mere existence of an "election of remedies or procedures" provision in the contract does not automatically foreclose the use of multiple options. For example, a contract containing an "election of procedures" clause, was interpreted to permit a grievant to file a sex discrimination complaint with a state agency and to file a grievance in arbitration. The arbitrator reasoned:

> The evidence shows that the set of facts associated with the Grievant's sex discrimination claim are not the same set of facts associated with her claim that she is entitled to a pay adjustment as provided by Section 18.4 of the Contract. While there may be some individual facts which are the same, the set of facts in both claims are dissimilar. The sex discrimination claim involves differential treatment, whereas the grievance claim involves a violation of the Agreement.[9]

In sum, alternatives exist for the resolution of discrimination disputes and aggrieved parties may use more than one alternative with some timing limitations. It may be possible to limit the use of the arbitral process alternative if an "election of remedies" clause is included in the agreement. Such clauses may be useful from the school district's point of view because they attempt to prevent a multiplicity of actions based on the claim. However, they may not always preclude the use of alternative forums and it is still possible for an employee to use multiple forums if the arbitrator is able to distinguish the types of claims or the set of facts. The United States Supreme Court has recognized that awards given in arbitration may be offset against awards granted by the court. In a footnote the Court said:

> Nor can it be maintained that election of remedies is required by the possibility of unjust enrichment through duplicative recoveries where, as here, the employer has prevailed at arbitration, there, of course, can be no duplicative recovery. But even in cases where the employee has first prevailed, judicial relief obtained can be structured to avoid such windfall gains.[10]

The Arbitral Alternative: The grievant may have alternative forums for resolving a discrimination dispute. One alternative is the arbitral process, which presents several advantages and disadvantages for resolving employment discrimination issues.

The disadvantages seem to center around the apparent lack of sensitivity and expertise of some arbitrators when dealing with employment discrimination issues. The advantages center around the accessibility and familiarity of the arbitral process to grievants interested in redressing claims, and the relative speed and lower cost of many arbitration decisions.

While the arbitral awards examined show an increased understanding of claims of discrimination, nevertheless, some awards show a lack of sensitivity to discrimination issues and a reluctance to find an issue of discrimination For example, an arbitrator refused to consider EEOC guidelines declaring pregnancy to be a disability meriting sick leave, and refused to grant sick leave to two grievants absent due to pregnancy. The arbitrator wrote, in 1975, as follows:

> In the past at least, pregnancy and sickness have not been considered to be synonomous, which is to say equivalent in meaning or expressing the same idea, with sickness....
>
> Whatever may be the leanings of the Equal Employment Opportunities Commission regarding the pregnancy-sick leave question, they are not binding upon this or any other arbitrator. The interpretive bulletins of governmental agencies do not constitute law. Such opinions are transitory, and subject to sudden and frequent changes due to the tendency of governmental agencies toward the broadest kind of preemption and authority. Their reach is always greater than their grasp in the belief that the courts are always there to correct any excesses in which they might indulge themselves.[11]

Another award rejected statistical evidence establishing discrimination on behalf of a university. The arbitrator stated:

> While the Advisory Arbitrator is in agreement with the position of Grievants that Staff Policy 200.1 and of University-Union Agreement, Point 1 should not be read to prohibit only consciously malicious ((sex-)discriminatory" practices, he is not in agreement with the proposition that the non-accidental measure of intent adopted by certain courts in interpreting the meaning of the word "intentional" as used in the Civil Rights Act of 1964...has applicability or should be followed in this case.[12]

The arbitrator rejected statistical evidence of unintentional discrimination. While courts do not always recognize statistical evidence as conclusive proof of discrimination, it is, nevertheless, a common method of proving adverse impact. Some arbitrators are reluctant to apply rules of interpretation to contract clauses that are commonly used by courts and federal agencies in the same area.

A related disadvantage in using the arbitral process to resolve discrimination disputes may be the arbitrator's lack of expertise on employment discrimination issues. For example, in a 1978 award in which an arbitrator upheld a findings of sexually discriminatory treatment under the contract, the arbitrator said the following:

> Consequently, the monetary award made herein will provide that it be contingent on the grievant's executing a general release to the College and that she will take all necessary measures to withdraw the complaint now pending before the Human Rights Commission and that the monies to be received by her shall constitute a complete release and satisfaction of any and all claims she may have against the College for any alleged discriminatory claim she now had, or had in the past, or which she may claim in the future.[13]

In light of the 1974 opinion expressed by the United States Supreme Court, that prior resort to arbitration does not constitute a waiver of later judicial relief, and in absence of any discussion of an "election of remedies" provision in the instant contract, the arbitrator's award appears to be in conflict with the court's ruling.

However, the advantages of using arbitration to resolve discrimination disputes may outweigh the disadvantages. Arbitration is a familiar, accessible procedure for employees to resolve disputes arising in the employment setting. It seems logical and wise to afford disputes involving discrimination the same access to arbitration as other employment issues. The mechanism is close to the context in which the dispute arose and does not require the grievant to use time consuming state or federal agencies in the resolution of the issue. Many such agencies are presently overloaded with claims yet to be addressed and it may take years to resolve the issue. The arbitration process may provide a more immediate resolution to the situation, to the advantage of both the school and the teacher.

In an interesting attempt to utilize the advantages of arbitration and minimize its disadvantages, Robert Coulson, President of the American Arbitration Association, has advanced an idea for the resolution of discrimination disputes.[14] He suggests setting up a special "lawyer-like system of arbitration" which would resolve individual statutory employment rights. The system would not be based on the collective bargaining contract, but upon the employment discrimination law. The process would be set up to insure that arbitrators selected for discrimination disputes would have both an expertise in the law and the labor context. The difficulties with this suggestion include obtaining recognition for a system which supplants the role of the judicial process and traditional arbitration, and treats discrimination issues as "special" and separable from other employment issues in arbitration.

General Issues

Introduction: Within the arbitral process in the educational sector, the most commonly raised form of discrimination is discrimination on the basis of sex. Included in this form of discrimination is the related issue of discrimination in the granting of pregnancy or maternity leaves. Nearly half of the recorded cases on discrimination dealt with sex discrimination and the related issue of maternity. Much less frequently, issues of discrimination on the basis of marital status, age, handicap, minority status, and religious discrimination arose.

Interestingly, the parties to the contract have alternatively used discrimination and affirmative action as a grievance or a defense. For example, one type of discrimination dispute involves an individual employee claiming discriminatory treatment, and the school district defending the treatment as non-discriminatory. On the other hand, the school district or employer may be the proponent of anti-discrimination efforts. For example, a case may involve protests filed by senior employees who were transferred over less senior employees. School districts may defend their actions on the basis that such action was necessary to "maintain a gender balance" or otherwise meet affirmative action requirements.[15]

Claims of discrimination and affirmative action arise in all types of employment situations. Grievants have claimed discrimination in the nonrenewal of their probationary contract.[16] Teachers have complained of discrimination in cuts in instructional programs,[17] differentials in salary schedules,[18] assignment of teaching duties,[19] and selection for summer school teaching.[20] Issues of discrimination on the basis of marital status have arisen in the context of determining the appropriate allocation of summer school teaching.[20] Issues of discrimination on the basis of marital status have arisen in the context of determining the appropriate allocation of health insurance benefits.[21] Religious discrimination commonly concerns the granting of leaves for religious observations[22] or performing work on religious holidays.[23]

Types of Contract Clauses: The resolution of any dispute in arbitration begins with the contract. A variety of contract clauses have been presented to arbitrators. Some clauses protect employees from discrimination, while others permit school districts to consider affirmative action when making employment decisions.

There are five general types of clauses commonly raised in discrimination disputes: general non-discrimination; general incorporation of external law; general saving clauses which incorporate external law; general affirmative action; or the inclusion of any of the above in some specific clause dealing, for example, with transfers.

The most common type of clause protecting employees is a general non-discrimination clause. One such board and comprehensive clause reads:

> Non-Discrimination: The provisions of this agreement and the salaries, terms, and conditions of employment shall be applied without regard to race, creed, religion, color, national origin, age, sex, nepotism, or marital status.[24]

Another clause used in discrimination disputes is one which protects the rights of employees under the law. Such a provision typically reads as follows:

> Nothing contained herein shall be construed to deny or restrict to any employee such rights as he may have under New Jersey School Laws or other applicable Laws and regulations. The rights granted to employee hereunder shall be deemed to be in addition to those provided elsewhere.[25]

The saving clause in the contract may also provide the contractual language for the resolution of a discrimination dispute. The language of such provisions typically reads:

> If any provision of this Agreement or any application of this Agreement to any employee or group of employees is held to be contrary to law, then such provisions or application shall not be deemed valid and subsisting, except to the extent permitted by law, but all other provisions or applications shall continue in full force and effect.[26]

It is less common to find a clause requiring affirmative action in employment. However, if such a provision exists in the contract it too may provide the contractual basis for a discrimination claim. One such clause reads as follows:

> The District agrees to take affirmative action to ensure that underrepresentation and under-utilization at all levels of responsibility of members of minority ethnic groups and women and/or men will be corrected.[27]

Lastly, the contract may contain provisions in which affirmative action considerations are to be one of several factors used in the decision-making process. An example of a clause used when making transfer decisions reads:

> When it has been determined that District-initiated transfer is necessary, first consideration shall be given to the following:
> (a) a teacher's area of competence, experience, and qualifications;
> (b) length of service...;
> (c) length of service in the particular school building involved;
> (d) proper application and effect of state and federal laws, regulations, and directives.
> Special consideration may be given to other relevant factors.[28]

Interpretation and External Law: When resolving discrimination disputes, the relevant contract clauses are presented by the parties. It is possible that a given contract will contain none of the above types of clauses nor any other clauses arguably relevant to the discrimination dispute. When interpreting this type of contract, the chances for upholding non-discrimination and affirmative action arguments are slim. At most, the arbitrator may apply a general reasonableness test to the situation. For example, an affirmative action argument failed when used when the contract clause provided for straight seniority when making transfers. The contract did not provide for affirmative action considerations to be used in making transfers. Consequently, the district did not have the authority to transfer a senior male teacher and retain two less senior female teachers to maintain a gender balance.[29]

Assuming the parties have a contract clause which permits the consideration of discrimination or affirmative action issues in the case, the issue then becomes how the clause is to be interpreted. Generally, if the language of the contract is not clear and unequivocal, the arbitrator may turn to considerations external to the contract to resolve the dispute. Arbitrators have looked to school district policy[30] or school bulletins[31] to interpret the intent of the parties. One such award upheld the involuntary transfer of a senior teacher over a junior instructor in order to meet program needs for affirmative action. The arbitrator relied on a school district bulletin which identified the criteria for filling vacancies for upcoming years as program needs, seniority, and affirmative action. In addition, the arbitrator pointed to a school board policy, which read:

> (The School District's commitment) to implement a program of faculty racial and ethnic balance which most closely approximates the racial and ethnic distribution of the total public school population...[32]

In addition to the consideration of policies outside the contract when interpreting or defining terms in the contract, some arbitrators consider external laws on discrimination, while others refuse. In a case dealing with maternity leave provisions in the contract, the arbitrator refused to require the parties to renegotiate the clause after a state court ruling which required maternity leave to be treated like any other disability leave. The arbitrator was called upon to determine if the clause violated the law, therefore, necessitating renegotiation of the clause. The arbitrator refused to make such a ruling and left the determination to the courts.[33]

Other arbitrators have been more willing to consider external law when interpreting contract clauses. One arbitrator stated a willingness as follows:

> The parties are split over the ever present issue of whether arbitrators are strictly proctors of the agreement, or must also interpret the effect of the law on the particular issue arising under the Agreement. In this case the agreement specifically makes the law contractually available to the parties...and no less to the Arbitrator. The District specifically undertakes to invoke no policies which shall result in sex discrimination as an equal opportunity employer.[34]

Determining whether various state and federal laws on anti-discrimination and affirmative action will be considered requires, first, determining whether any clause in the contract permits such consideration. Certain types of contract clauses on discrimination should be more likely to evoke the consideration of external law than others. Clauses which closely repeat the words used in the statute should call for the consideration of external law, regarding how the clause has been legally defined. For example, if the bargaining history shows the parties looked to the external law, then the arbitrator should also consider the external definitions given those words by the legal system. The following diagram depicts the relationship between different types of contract clauses on discrimination and the likelihood that arbitrators should consider the external law when resolving a dispute.

The Relationship Between Types of Contract Clauses
and the Likelihood Arbitrators Should Consider External Laws

Contract Clauses	Likelihood that Arbitrators Should Consider External Law
Literal Replication of the Language of Anti-Discrimination Laws in Contract Clause	High ↑
Affirmative Action Provisions in Contract	Increasing Likelihood
"No Violation of Law" Clause in Contract	
Non-Discrimination Clause in the Contract	Decreasing Likelihood
No Non-Discrimination Clause in the Contract	↓ Low

Finally, the arbitrator will look to external law when the contract, being ambiguous, lends itself to two interpretations, one of which would violate the law, the other interpretation which would not. The determination of which interpretation is appropriate necessitates looking at what the law does or does not allow. An example is an award in which the board was found to have violated the contract when it placed the grievant on pregnancy leave rather than sick leave as requested by the grievant.[35] The Arbitrator relied on the external law of Title VII which requires sick leave to be extended to absences related to pregnancy. He reasoned as follows:

> The intentions of the parties to an agreement is of course paramount, but where the intention is imperfectly stated and one construction results in a violation of prevailing law and another does not, in a context where the law is in effect incorporated into the agreement, it seems clear that the Arbitrator should opt for the latter consideration.[36]

Proof

Burden of Proof: Judicial interpretation of federal law has distinguished burden of proof in discrimination cases and burden of proof in other cases. The general rule concerning the burden of proof in areas other than discrimination places the burden of establishing a prima facie case and burden of "going forward with the evidence" upon the claiment or plaintiff. On the other hand, in cases raising claims of discrimination the employee must first establish a prima facie case. Having done that, then the burden of "going forward with the evidence" shifts to the employer to provide that the employer did not discriminate. If the employer establishes a non-discriminatory bases for the decision, the burden shifts back to the employee to prove the employer's reasons are a sham.[37] Courts have established this procedural distinction in the discrimination area because it is usually employers who have better access to the relevant information (employment records) about a discrimination claim and therefore courts have found it appropriate to place a major evidentiary burden on the party with the information. Arbitration awards also use this procedural method. An arbitration award recited the same rule:

> The law of Title VII of the Civil Rights Act of 1964 is that wherever a minority (and my assumption is that the rule applies to women as well) comes forward and shows that the job has been vacant and that the individual denied the job is qualified for it, a prima facie case of discrimination has been made and the burden shifts to the other side to explain why the minority or woman was denied the job.[38]

The case went on to apply the burden of proof rule cited above. A woman applied for the position of curriculum coordinator, which was an administrative position on the superintendent's staff. A man was selected for the job and the women, represented by the union, took the matter to arbitration. The contract had both a non-discrimination clause and an affirmative action provision. The grievant claimed a violation of the non-discrimination clause in the contract and made out a prima facie case of discrimination. The school district defended its actions on the basis that it had already met its affirmative action goals for the current year by hiring four women for eight administrative vacancies in the district. However, the district offered no proof that the man selected had neither equal nor greater qualifications for the job than the grievant. The arbitrator upheld the grievant's claim and said the district had not met its burden of "going forward with the evidence."

> While I am of the view that the District's hiring record must be commended and that it shows substantial steps forward, the fact of the matter is that whether the affirmative action contract provisions have been met or not...an individual may still appropriately protest alleged discriminatory practices. This is what (she) did in this case. Inasmuch as adequate rebuttal in the form of superior or equal qualifications for the individual selected for the job has not been introduced into evidence I conclude that the prima facie case made out by (her) under the circumstances must be regarded as conclusive.... Accordingly, I hold that the District violated 1.3 of Article I of the Agreement in failing to select (her) as Curriculum Coordinator. As stated above, the District has made progress--but it has not met its burden with regard to (her) once it conceded that she was qualified. Therefore, the grievance is sustained.[39]

Meeting a Burden of Proof: Meeting a burden of proof in a discrimination dispute will be examined in three ways: (1) Grievants win by proving discrimination; (2) employers win by showing use of job related, non-discriminatory factors; (3) employers win by showing their use of affirmative action goals.

In proving a claim, grievants must first articulate a prima facie case of discrimination. This includes proving that the grievant is a member of a protected class which is singled out for protection by the contract. In one case, a grievant failed to make out a prima facie case of discrimination when the grievant was singled out for extra supervision as department head. The complaint alleged violation of the right to academic freedom and "organizational rights" to participate in collective negotiations. The arbitrator agreed that the grievant had been singled out, but only because of a problem in her department.[40] The case illustrates a poorly articulated prima facie case of discrimination. The grievant did not attempt to prove membership in a protected class, i.e., sex discrimination, but rather alleged disparate treatment in the broader sense, discussed earlier, under general contract clauses calling for academic freedom and the right to participate freely in collective negotiations.

Once the grievant has established a prima facie claim, the employer must come forward with sufficient evidence to refute the claim. Defending against claims of discrimination have been successful where the employer could establish (1) a bona fide occupational qualification and (2) efforts to address the grievant's concerns. An award found a bona fide occupational qualification when a male grievant was denied the chance to teach a female P.E. class. The arbitrator ruled that the grievant was not discriminated against on the basis of sex. The job description required a person who was able to teach and supervise the lockers. Such a combination of job requirements was reasonable and as the grievant was male, he did not qualify for the job because he could not supervise the female lockers. The arbitrator went on to point out that even Title IX permits some jobs to be classified for males or females only when a bona fide occupational qualification exists.[41]

In a second case, a school district successfully defended by proving its efforts to accomodate the grievant's handicap. The grievant had alleged discrimination on the basis of handicap when he was discharged for poor work performance. The arbitrator upheld the school district's right to discharge the grievant and pointed to clear evidence that the district had made "extraordinatory efforts" to accomodate the grievant's handicap. The district had "specifically designed job programs and situations to make him a productive worker."[42]

Once the school district has come forward with sufficient evidence to disprove the claim, it then becomes the grievant's burden to prove the charge of discrimination, that is, to show that the employer's defense is a sham. To prove their case, grievants need evidence to show that the decision is discriminatory. A well planned complainant's case should include any available statistical evidence, along with sufficient factual reasons why the treatment is inequitable. An example is a case in which a school board did not renew the contract of the coach of female softball and basketball. The arbitrator ruled the non-renewal was a reprisal for the grievant's testifying in a complaint before HEW alleging inequities in the women's sports programs.

The school district claimed the non-renewal was due to declining enrollments in the program, but the statistical evidence as a whole did not support this assertion. The arbitrator had a number of other factors to point to in upholding the claim: the suddenness of the board's action to non-renew, the lack of reasons for the action, the recommendation for renewal given by the grievant's superior, along with the fact of the grievant's testifying in the HEW complaint.[43]

Another illustration of a successful claim of discrimination is a case involving a program cutback at a college. The program had only one instructor, the grievant. The college alleged that the school was faced with declining enrollments and that graduates from the grievant's program were not finding jobs. The arbitrator found the college's allegations unsupported by the evidence as a whole. The college had originally decided to cut six programs, and then changed its mind, cutting only the grievant's program. The grievant had a previous finding of discrimination in a past arbitration award and had been reinstated only three days when the board acted. The statistical sex composition of the college's programs showed an underrepresentation of females in the professional ranks, and the grievant was in those ranks.[44]

Finally, it is noteworthy that grievants do not need to prove that the employer intentionally discriminated to successfully prove a claim of discrimination. Unintentional, as well as intentional, forms of discrimination are prohibited by the law. An arbitrator reflected this rule when sustaining a grievance over differentials in salary adjustments made by an employer. The arbitrator noted the employer did not intend to discriminate, but, nevertheless, unintentionally did so.

> ...[T]here is no question but that the Board, and School Administration, acted in entire good faith, without any deliberate or conscious intent to discriminate against the grievant.... Nevertheless, the conclusion is unavoidable that the grievant was, perhaps inadvertently and unintentionally denied equal treatment so as to violate the overriding principle of fair treatment, and avoidance of discrimination.[45]

School districts may defend employment decisions as being based in part on affirmative action considerations. The district's case is far easier to establish if there are affirmative action requirements somewhere in the contract, or in policies incorporated by reference into the contract. In one case, a district was unsuccessful in justifying the consideration of affirmative action in transferring employees. The district transferred a senior male P.E. teacher rather than two junior female teachers. The contract provided for straight seniority when making transfers and therefore the district did not have the managerial right to make transfers based on affirmative action considerations.[46] On the other hand, districts have successfully defended the consideration of affirmative action in employment because they could demonstrate a contractual basis for the claim. In one case, a senior, female grievant was not recalled to teach kindergarten, while a junior, black male teacher was retained. The district defended that the action was taken to meet affirmative action requirements. The arbitrator upheld the actions based on contractual goals for affirmative action.[47] In another case, a district was successful in retaining a junior, minority teacher over a senior teacher because seniority was only one of three factors to be used in determining transfers.[48]

Discrimination and the Reasonableness Test

In arbitration, discrimination, as a word, is traditionally used to include actions that go beyond what equal opportunity laws would cover. In some instances, it is a conscious decision to expand the concept. In other instances, it is the more general use of a word which has recently come to have a very specific meaning in equal employment law.

Arbitrators may use the word discrimination to cover inequitable treatment in areas beyond the limited scope of equal opportunity legislation. An illustrative example is a case in which an arbitrator was presented with the differential payment of two similarly-situated male principals. These principals were unable to articulate membership in a protected class, and therefore the non-discrimination clause in the contract was inapplicable. However, the arbitrator proceeded to uphold the grievant's claim by implying a general requirement of non-discrimination and fairness into the contract. The arbitrator stated the point as follows:

> An examination of the language of the "non-discrimination clause" appearing on page 28 of the Education Agreement, indicates that it is designed solely to guard against discrimination "because of race, creed, religion, or sex," and does not expressly prohibit, or deal with other forms of discrimination, including failure to treat certificated employees who may be considered as being within the "bargaining unit" in a fair, equitable, and non-discriminatory manner. However, reason and logic would indicate that such provision, and requirement is implicit in the language of the Agreement as written. The duty to guard against discriminatory treatment of personnel similarity situated is universally considered as implied in all collective bargaining agreements.[49]

The case did not present a factual basis upon which to apply the concept of anti-discrimination as defined by the law. The grievants' situation did not constitute differential treatment due to membership in a protected class as both were white males. Arbitration is not a judicial forum and, consequently, the same usages given the term by the legal system may not be required within arbitration. However, the arbitrator might have reached a similar result by applying the reasonableness standard so often employed in arbitration and have avoided the mixed use of the word discrimination, i.e., equal employment law v. equitable treatment of similarly-situated individuals.

The case also makes the general assertion that personnel should have an implied right to non-discriminatory treatment. Extending this logic, it seems possible that contracts which contain no anti-discrimination (i.e., equal employment) clause, may have one implied therein. The result may be that when a factual situation arises in which a grievant is suffering discriminatory treatment forbidden by the law (equal employment legislation), but the contract does not contain a clause forbidding such a practice, the arbitrator may, nevertheless, sustain the grievance. Such an extension, however, may violate established traditions of contract interpretation in arbitration. By applying the general reasonableness test, frequently used in arbitration, these long established traditions may be less disturbed.

This decision illustrates how closely the general reasonableness standard comes to the requirements of anti-discrimination contract clauses and laws. These provisions seek equitable treatment of all, regardless of their race, color, sex, etc. The reasonableness test also calls for equitable treatment in making employment decisions concerning similarly situated individuals, but is not limited to specified protected classes. Consequently, the non-discrimination clause may represent an express codification of a right long implied by arbitration in the reasonableness standard.

The reasonableness standard is so similar to the concept of anti-discrimination that the word often appears when discussing the standard. The reasonableness standard has been defined as a protection against arbitrary, capricious, and discriminatory treatment. Arbitrators have also used the term in this sense. For example, an arbitrator used the term when discussing the reasonableness of an employee's evaluation:

> It is the opinion of the arbitrator that the exercise of School Committee discretion, through its agents, in having the grievant evaluated by her principal with whom strong feelings of mutual animosity existed, was discriminatory. Particularly so because the evaluation is allowed to stand without the rquired supporting records.50

Notice the arbitrator is not concerned with placing the grievant within a protected class, but instead views her particular treatment as unfair or discriminatory in its broader sense. One risk, however, of using the term in its broader sense may be a tendency to ignore the specific connotations the term has come to have within the field of equal employment.

Awards

Seventy some cases were noted which contained discrimination issues in some form from 1973 until 1979. In half of these awards the arbitrator denied the grievance. The cases, which were sustained by arbitrators will be summarized below to identify the types of remedies granted by the arbitrators. The remedies range from reinstatement to cease and desist award against the school district.

First, is a group of awards in which the arbitrator reinstated the grievants to their former position or required the grievants to be appointed for the first time to a position.[51] An example, is a case in which the grievant applied, but was turned down, for the administrative position of curriculum coordinator. The position was given to a male. The arbitrator ruled that the grievant was to be appointed to the position for the upcoming school year.[52] Several awards granted back pay,[53] others required a salary adjustment.[54] These cases were typically filed as a class action and frequently involved the equalization of female coaching salaries with male coaching salaries.[55] Of all the discrimination disputes filed by individual female grievants, cases raising pregnancy issues were the most common types of disputes. Consequently, several awards granted sick leave pay for leaves related to pregnancy.[56] In other awards the arbitrator required the parties to reconsider any employment decision.[57] For example, a college responsible for grievant's tenure was required to convene a committee to consider de novo the grievant's case.[58] An arbitrator required the school to include the award in the grievant's personnel file.[59] The grievant in this case had received a down-graded evaluation because of union activities. A cease and desist award was granted to stop the school district from denying a grievant access to facilities available to other faculty and staff. The grievant was active in the gay liberation movement which the arbitrator found to be a political activity. Therefore, the school could not territorially restrict him to his office in order to avoid contact with students.[60] An unusual award granted interest to grievants improperly denied equitable salaries due to discrimination on the basis of sex. Awards granting interest are rate in arbitration, however, an arbitrator granted 6 percent interest on retroactive pay owed female coaches.[61] Another extraordinary award for willful discrimination comes close to an award for punitive damages. The grievant was found to have suffered discrimination on the basis of union activities. The arbitrator found the principal's actions toward the grievant to be petty, capricious, and showed a "strong animus" toward the grievant, a union representative. The school was required to pay $500 to the faculty fund to be applied to student field trips.[62] Lastly, are two awards in which the arbitrator gave parties on both sides of the case some relief. One award permitted the school to retain a black male kindergarten teacher rather than a female teacher who had been involuntarily transferred from the position. The action was permissable, given affirmative action requirements the district faced. However, the grievant was still to be given the choice of one of the next two vacancies in the district.[63] The second award involved a finding of sex discrimination against the school under the contract. The arbitrator would not reinstate the program and ultimately the grievant to her position. Her salary for the period would have been $15,000. The association requested $24,583 but the arbitrator awarded only $8,000 as an "equitable balance" between grievant and the monetary burden to the school.[64]

Conclusion

Discrimination, as an issue in arbitration, is quantitatively small but qualitively important to employers and employees. While few awards raised discrimination issues, the issue is, nevertheless, important to employers and employees because it deals with legislatively and constitutionally protected fundamental rights. One reason for the small number of cases in arbitration on this important issue may be the existence of several alternatives for remedying a discrimination dispute. Another reason few cases raise discrimination issues may be the mixed value the arbitral alternative has for aggrieved parties.

Sex discrimination is the typical form of discrimination raised in school arbitration cases. The factual context for the dispute is as varied as the decision-making affecting educational employment. Both employer and employee may be the advocate for non-discriminatory treatment and affirmative action.

Employees must carefully allege a prima facie case of discrimination by proving their membership in a class of employees protected by a contract provision. Employees may establish the burden of proof by presenting several facts to support their claim, one of which may be statistical evidence of underrepresentation of a protected class, of which grievant is a member.

Employers may also carry the burden of coming forward with enough evidence to disprove the charge of discrimination. At other times, the district may be the proponent for using affirmative action considerations in making employment decisions.

To both the employee and the employer the contract clause is crucial. The presence or absence of provisions on anti-discrimination or affirmative action may be determinative of the outcome of the dispute. The type of provision in the contract on anti-discrimination or affirmative action may also determine the likelihood arbitrators will look to external laws to resolve the dispute.

Representatives of parties to a grievance may find awards granted by arbitrators in the discrimination area to be a bit unusual when compared with awards on other issues in arbitration. An award of interest to an aggrieved party has been given and a monetary award which closely approximates punitative damages has also occured. As a result, award requests should be creatively fashioned to fully compensate the aggrieved claimant.

Arbitrators should carefully identify the mixed use of the term discrimination in situations raising legally-recognized forms of discrimination and in situations involving the reasonableness test. In some cases the chance of confusing discrimination with the general reasonableness standard of review is high. In the discrimination area, where much of the definition of what is and is not discriminatory treatment has been legally defined, it seems advisable for arbitrators to look to the external law when resolving a discriminatory dispute. When language in the contract calls for conformance with the law or where the provision literally repeats the words of the law, the arbitrator should look to the external law for definitions and assistance in interpreting the words of the contract.

Footnotes

1. 115 AIS 1
2. 91 AIS 9
3. See generally Larson, Employment Discrimination, Volume 2: Procedures Remedies, Matthew Bender: New York (1979).
4. Alexander v. Gardner-Denver Co., 415 US 36 (1974).
5. Ibid.
6. Ibid at 51.
7. 113 AIS 5.
8. Ibid.
9. Ibid.
10. Alexander v. Gardner-Denver Co., 415 US 36, 51 (1974).
11. 72 AIS 21.
12. 57 AIS ER 8.
13. 105 AIS 13.
14. Coulson, Fair Treatment: Voluntary Arbitration of Employee Claims, 33 Arbitration Journal 23 (1978(.
15. 115 AIS 1, 65 AIS 2.
16. 100 AIS 9.
17. 105 AIS 13.
18. 71 AIS 1.
19. 96 AIS 1.
20. 56 AIS EB 14.
21. 104 AIS 8, 56 AIS F-4.
22. 55 AIS AL-5.
23. 97 AIS 23.

24. 105 AIS 13.

25. 90 AIS 8.

26. 90 AIS 8.

27. 91 AIS 9.

28. 112 AIS 4.

29. 115 AIS 1.

30. 99 AIS 22.

31. 70 AIS 10.

32. *Ibid.*

33. 90 AIS 10.

34. 74 AIS 18.

35. 74 AIS 18.

36. *Ibid.*

37. See *McDonnell Douglas Corp. v. Green*, 411 US 792 (1973).

38. 91 AIS 9.

39. *Ibid.*

40. 86 AIS 2.

41. 96 AIS 5.

42. 108 AIS 20.

43. 100 AIS 9.

44. 105 AIS 13.

45. 98 AIS 11.

46. 115 AIS 1.

47. 70 AIS 5.

48. 70 AIS 10.

49. 98 AIS 11.

50. 41 AIS M-5.

51. 79 AIS 5, 100 AIS 9, 91 AIS 9, 81 AIS 17, 107 AIS 8, 115 AIS 1, 99 AIS 22, 69 AIS 19, 111 AIS 13.

52. 91 AIS 9.

53. 105 AIS 13, 91 AIS 9, 105 AIS 14, 61 AIS 11, 67 AIS 12.

54. 61 AIS 11, 67 AIS 12, 82 AIS 3, 90 AIS 8, 97 AIS 23, 105 AIS 14, 98 AIS 11.

55. 90 AIS 8, 82 AIS 3, 67 AIS 12, 61 AIS 11.

56. 110 AIS 20, 74 AIS 18, 57 AIS 13, 103 AIS 18 -- eligible for insurance benefits during pregnancy leave, 60 AIS 19 -- granted child dependency allowance.

57. 82 AIS 21, 113 AIS 5, 89 AIS 11.

58. 82 AIS 21.

59. 79 AIS 7.

60. 48 AIS AX 2.

61. 61 AIS 11.

62. 92 AIS 20.

63. 70 AIS 5.

64. 105 AIS 13.

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Introduction

Nature of Issue: Grievances about leave issues rank slightly higher than extra duty grievances as being the most common dispute in the cases that were studied. Two-thirds of these leave grievances were filed by individuals, with the remainder being filed by a class of two or more persons. Female teachers appear to be more likely to file a leave grievance than are males. This may reflect, in part, their greater numbers in the profession, and pregnancy and maternity issues.

There are a bewildering number of potential leave issues. The variety exists for a number of reasons. One reason is that the contract clauses are often ambiguous and incomplete. Other reasons include the great number of different types of leave that are defined in the contracts. Nearly every example of the whole range of problems faced by human beings seem to be reflected in the reasons given for a leave request or an absence. The reaction of a school administrator to similar problems is sometimes inconsistent, which leads to further problems. Administrators may be suspicious of the teachers' motives in requesting a leave, causing them to occasionally ignore the language of the contract. Finally, changes in the external law may necessitate alterations in the district's past practices.

The focus of this chapter will be upon a limited number of these problems. First, the general problems of administering a leave program will be reviewed. Then some specific types of leave problems will then be reviewed in the areas of sick-disability leave, sabbatical leave, travel and weather leave issues, and a catch-all category of personal, emergency, and other forms of leave.

Leave issues come in a variety of forms, however, two questions are commonly the focus of attention. One question is whether the leave request for a certain type of discretionary leave was reasonably denied. The second and related question is whether the teacher is entitled to a paid or unpaid leave. Prior to taking a leave, a teacher commonly requests a specific type of paid leave. If the request is denied, the teachers may still be eligible for an unpaid leave, but may grieve the refusal to grant the leave in a paid category. Another common way in which the pay matter arises is the the teacher is now absent or has missed a period of work and seeks to have the period covered by a paid leave category.

Approaches: The leave question may raise some fundamental issues. On the one hand, issues of management rights are raised. One arbitrator stated, in the leave context:

> The District, in its managerial role as a public employer, is charged with the responsibility of providing public education in an efficient and economic manner.[1]

The rights of management are commonly tempered by limiting management to a discretionary power to grant or deny a leave request. Where such discretion is involved, its use may be subject to a review for reasonableness. On the other hand, the leave provisions are a significant benefit to the employees.

> In contrast to the freedom of management to make changes in the exercise of basic management functions, arbiters have often ruled custom to be binding where it involved a "benefit" of special personal value to an employee such as maternity leaves and/or sick leave.[2]

In addition to the benefit aspect, leaves often involve issues of basic human concern, such as birth, death, sickness, and other circumstances beyond individual control. The volume of leave decisions indicates that leaves represent a significant facet of any program of personnel administration. A number of patterns of decision-making are likely to arise, making past practices particularly relevant in an arbitration hearing. It may be useful to recall a common definition of past practices:

> Generally speaking, when arbitrators rely on past practice they are concerned with behavior that is firmly established, predictable, and consistent; mutually accepted and expected.[3]

Thus management rights, the welfare of individuals, past practices, and broad contract language must be considered when reaching a decision in a leave dispute.

General Issues

Introduction: The variety leave clauses and the variety reasons given for a leave request make many of the cases very fact specific. The precedential value of each case diminishes as the facts become more unique. There are, however, some overall issues that are common to many leave disputes. This section seeks to discuss some of these overall issues.

Exercise of Discretion: In general, employers do not automatically grant many types of leave requests, particularly paid leave requests. The school administrator is often given the discretion by contract to grant or deny the request, based upon a variety of considerations. The exercise of this discretion may be subject to review. The contract does not permit decision-making by the coin flip method nor by the weighing of irrelevant factors. LImits on the exercise of the administrator's discretion vary:

(1) The contract may contain a list of factors that the administrator must consider. For example, leaves may be granted only upon the happening of specified events.

(2) The contract may contain a statement of the goals of the leave program. Such a statement may be read to mean that only leaves which meet those goals are permissible. An example might be a requirement that a convention type of leave must be of benefit both to the teacher and to the school.

(3) The contract may impose a reasonableness requirement on the decision-maker. Reasonableness may be expressed by requiring the decision not be arbitrary, capricious, an abuse of discretion, or discriminatory.

(4) In the absence of other specific contractual limitations, the arbitrator may apply a general requirement of reasonableness.

Arbitrators have recognized the reasonableness limitation and some of the above requirements in the following ways:

> It should be noted that under fundamental principles of law, whenever discretion is reposed in a body or in an individual, it is legally assumed that such discretion shall not be "arbitrarily or capriciously" abused. The terms "arbitrary and capricious" in this context generally mean that no fair or logical basis whatsoever existed for the determination...the term "unreasonable," however, connotes that judgement was based on discretion, unfairly arrived at and without a proper logical basis.[4]

Another arbitrator stated:

> Capricious and arbitrary mean decisions and actions not based upon a principle, snap judgments not made after a review of the facts, not based upon reasons.[5]

The discretionary granting or denial of a leave request first requires a review of the contract for guidelines, and then a reasonable application of those guidelines. The specific limitations (reasons, goals, or other guides) must be clearly identified. The facts upon which the request is based are then compared. If they match, the leave is permissible; if they do not match, the leave can be denied. Since the facts of the request may be specific and the guidelines may be general, the matter is obviously more complex than these few sentences indicate. However, the steps outlined above should be carefully identified if the matter goes to arbitration. Application of the demonstratable facts to the contract terms is the essence of the decision-making process. Improper decisions may result from looking only at the facts underlying the request to measure the degree of need (and ignoring the contract), or from applying assumed, possibly unproven, facts to the contract. The decision-maker must operate within the specific limitations of the request and the contract. Attempting to measure the request by some other form of "equity" will often result in the district losing a case in arbitration.

Where the contract states that an employee "may" be granted a leave, the word "may" (as compared with "shall") gives the school employer discretion in granting leaves.[6] By contrast, where the contract states that a leave "shall" be granted under certain circumstances, the "shall" is usually mandatory. Some contracts, however, enumerate the conditions under which a leave request will be denied. Presumably, if a request recites a situation other than one of the enumerated exclusions, the request should be granted.

> It is noted that the eight exclusionary items are recited as reasons for which the employees are not entitled to personal leave...[T]he language of the Agreement...then means that the teachers are entitled to personal leave for any reasons under the sun, now known or in the future envisioned, except for the activities being specifically enumerated within the eight exclusions.[7]

Thus, the contract may be written in positive terms (leave granted if conditions are met) or negative terms (no leave for enumerated conditions but leave permitted for reasons other than those enumerated). It may be important to review the bargaining history to determine whether the negative or positive language was specifically chosen with some goal in mind. If so, the goal may be an element to be weighed in the decision to grant or deny a leave request.

Bad Faith: Employees who are suspicious that the employer is "out to get them" are found in schools as well as other workplaces. The suspicion may become public when a leave request is denied. The suspicion is often more feeling than founded in facts. A common approach to this problem was dealt with in the following case concerning the assignment of a teacher returning from a leave:

> Nor is there any point of discussing the good or suspect motive of the School Board in this instance unless it acted unreasonably or in an arbitrary way. Under the agreement(s) and law it is irrelevant, although there is no evidence presented to create even a light impression that...(grievant) was singled out for harsh and exceptional treatment--that he was in reality the object of a design to undermine his usefulness to the District or to "set him up" for later dismissal if he proved unable or unwilling to teach General Science...[8]

Where such a motive is suspected, a very heavy burden appears to be placed on the grievant to show clear evidence. A "feeling" will not convince the arbitrator. With this type of complaint as the basis of the grievance, the odds of showing that it really exists seem slight. When this type of allegation is included along with others, it seems to attract little attention. As suggested above, its primary value appears to be in cases where the school district cannot show any reason for its decision, and there is evidence of the unfair treatment of grievant in other decisions.

In summary, discretionary denials of leave requests are more likely to be ruled to be reasonable where the school bases the denial upon reasons or policies identified in the contract or where the school district can point to reasonable alternatives available to the teacher other than taking a leave. Where bad faith is charged in a discretionary denial, the burden of producing clear evidence is on the teacher.

Failure to Process: A school administrator's discretionary denial of a leave request has been found to be unreasonable by arbitrators in a number of circumstances. Therefore, it is risky for an employer to simply give a summary denial. Where the rquest and response are almost simultaneous, there is often little time to compare the facts with the contract guidelines. Where a summary denial is based on a failure of the teacher to provide information, it may be the duty of the school to request further information. If the summary denial is based on an assumption the school makes about the request, the assumption will have to be based on facts. Again, this may require the school to obtain additional information.[9]

Decisions must result from the regular processing of the leave request. In the absence of a showing that the request was given the normal amount of scrutiny, the denial may be found to be unreasonable. Where a contract authorizing sabbatical leaves is approaching expiration, it may be unreasonable for the school to refuse to consider sabbatical requests because of the nearness of the contract expiration.[10] The arbitrator did not say sabbatical leaves must be granted, but the arbitrator would not permit the school to refuse leave requests without even considering them during the remaining life of the contract. Where the school closed for five days in an energy saving shutdown, it was unreasonable for the school to unilaterally charge the employees with five days of vacation leave.[11] Presumably, part of the problem is the unilateral decision-making process, which is the antithesis of the collective bargaining relationship. Part of the problem may also be that the unilateral decision-maker did not have adequate information because of the failure to consult.

Refusal to Exercise Discretion: The exercise of discretion is a complex process. Discretion does not necessarily require an even number of "yes" answers and "no" answers over time. For example, a contract gave a school district the discretion to require a doctor's statement in certain types of leave situations. One principal exercised the discretion by requiring the statement in every leave of the described type. The arbitrator found that such a use of discretation was reasonable.[12] On the other hand, in another case, the contract permitted leave for "personal, legal, business, household, or family matters." The superintendent issued a directive stating that no leave, for any reason, would be granted prior to or immediately after a vacation period. The arbitrator found this to be unreasonable because the contract did not provide the right to refuse leaves because they were taken close to a holiday.[13] Obviously, individual requests may, nevertheless, be denied in the holidays circumstances where they do not meet the contractual criteria of "personal, legal, etc."

Past Practices: A past practice involving the exercise of discretion may be important but difficult to prove, as was indicated in the following manner:

> No binding past practice can stem from the reasonable exercise of reserved discretion. Even if the record showed that the Committee granted 3 sabbaticals each year for the past 15 years without exception, this would not constitute a binding past practice, where the Committee's discretion to grant or not grant sabbaticals is preserved by the clear language of...(the contract).[14]

Where the contract permits the use of discretion, the unreasonable imposition of a past practice should not be permitted to effectively cancel the contract's permission to use discretion.

Procedure: Where discretion is permitted, the contract does not mean "anything goes." As indicated above, the exercise of discretion requires a reasonable application of the facts presented with the request to the language of the contract. This places primary emphasis on the substantive aspects of the decisions. However, the procedural aspect of processing the request must also be done reasonably. One arbitrator stated a procedural limitation in this manner:

> The arbitrator interprets (the contract to mean) the parties intended refusals of request for personal leave to be prompt and reasonable...[T]he Arbitrator finds as unreasonably late, and therefore in violation of the agreement,...(the superintendent's advising...(grievant) a few days prior (to his leave that) his "granting" of the request was being changed to a "refusal."[15]

Reasons: Some contracts provide that requests for leave will be granted only when reasons, given in the request, meet the limitations on the specification of reasons mentioned in the contract. Other contracts provide for only certain types of leave, but say nothing about the teacher providing reasons or information, either before or after the leave is taken. Whether the grounds for granting leave, as stated in the contract, match the request is reviewable matter for the school. This section briefly considers the issue of whether, when the contract is silent, reasons can be required as part of the leave process. Difficulties over the need to provide reasons often occur in the personal leave request situation. Teachers may feel that personal leaves are truly "personal" and no explanation is needed. The administration may feel that the leave must be justified, i.e., reasons.

Absent absolute contractual clarity, arbitrators have liberally construed management rights when the school administrators seek specific information about a leave request. In one instance, the contract prohibited the school district from asking for a reason prior to the leave. The contract also required the school district to act in a "consistent and equitable fashion," in administering the personal leave provisions. The arbitrator ruled that information could be requested after the leave, otherwise the school district would not know if it was following the requirements for "consistent and equitable" administration,[16] e.g., granting requests under comparable conditions.

Some leaves are designated as being for specific purposes, for example, business leave, emergency leave, and personal. The specific designation does not permit teachers to take leaves at any time or for any purpose. Where the contract is silent on the reasons problems, the arbitrator may rule that reasons must be given so that the administrators will know if they are meeting the limitations of the leave clause. One arbitrator noted that the mere process of application would be meaningless unless reasons were required.[17]

On the other hand, another arbitrator ruled that, in the absence of a contractual requirement for reasons or an explicit school policy requiring reasons, the school district could not merely assume that employees who took sick leave were, in reality, going deer hunting.[18] The burden of showing abuse was placed upon the school. However, if the school acquires a reasonable quantum of evidence indicating abuse of the leave benefit, the burden of going forward with reasons or justification may shift to the grievants. Another way of viewing this is that, initially, no reasons may be required under the contract. If the school district, however, obtains information from other sources indicating a possible abuse of the contract, then the teacher may have to supply reasons or justification.

One of the obstacles that a school district may face, when imposing a new requirement to provide reasons for a leave request, may lie in their own past practices. Under a contract, in which there has been no requirement for reasons or where there has been a requirement but no enforcement, the school district may not initiate such a requirement without the timely promulgation of a new rule consistent with the contract.[19] In addition to adequate notice, the substance of the rule must also be reasonable.[20]

Request Must Be In Proper Form: One of the common problems that teachers face in a leave situation is their failure to follow the leave procedures. While making a sick leave request is some indication of sickness at the time of the request, teachers who merely call in and report their absence may not qualify for sick leave.[21] A post-request statement of illness in some circumstances may still be inadequate because the employers at the later date, may be unable to determine if there was a bona fide illness at the time of the request. Another example of a teacher's failure to follow the contract involved a sabbatical leave. Under the contract, approval of the teacher's travel, for the purpose of later granting salary credits for the trip, had to be obtained prior to departure. Where the teacher made the application, but left without obtaining the response, the teacher was not entitled to credits for the completed travel.[22] The failure to initially inform the school might also be held against the grievant teacher who applies for such credits upon return.[23] However, where a teacher has made adequate advance inquiry or request, and has acted in reliance upon the erroneous information received, the school district may be prohibited from denying the teacher's request for a right or privilege upon return.[24]

Abuse of Leave: Leave is often a privilege, to be reasonably granted under the contract, not an absolute right. Where a teacher has applied for a leave and has been denied, and then is absent anyway, a severe sanction may result.[25] Teachers cannot assume that a contract is solely a restriction on management. However, the school district may be bound to its own past practices, particularly where similar incidents have been overlooked in the past.[26]

The school district, in the area of leave, may sometimes suspect that teachers are taking unfair advantage of the leave provisions. A common problem in the leave area is the attempt to take a leave on the beginning or ending of a vacation period. Some contracts may permit such a practice, others may explicitly prohibit it. For example, an arbitrator ruled the contract had been violated when the grounds for taking a leave were stated in the contract, but the school district unilaterially declared that such grounds did not apply close to a holiday.[27] This is not to say that leaves must be granted during that time. However, the school may not refuse to process the requests in the usual manner.

Where leave benefits have been abused, appropriate personnel sanctions may be administered. However, the school must follow the correct discipline procedures. In an illustrative case, a school felt that a teacher was using sick leave to extend weekends and warned the teacher about "excessive absenteeism." Later it sought to discharge the teacher for an abuse of sick leave rights without further notice and warning. The grounds for the earlier warnings had been the sick leave requests, but the district did not mentioned them in the discharge. The district had remained silent in the past and therefore, could not abruptly use it as the basis of a discharge without warning the individual.

Where a leave is taken for a given purpose, the teacher may not be permitted to subsequently use the leave time for an unrelated purpose. For example, a day of sick leave was used by the teacher first to go to a doctor, and then to go to a basketball tournament. The employer reprimanded the teacher. The arbitrator found the teacher, who needed the sick leave, had a duty to "maximize the conditions under which his recuperation will take place..."[28]

An arbitrator will not permit a school district's general fear of mass abuse of leave provisions to enter in when interpreting the contract. One arbitrator stated the matter as follows:

> If the District is afraid that teachers will abuse (sick leave)... the proper place to discuss such possible abuse and remedies therefore is the bargaining table and not arbitration.[29]

On the other hand, if the school district can show a factual basis for assertion, the result may be different.

Return from Leave: A few leave cases discuss what happens to a teacher upon returning from a leave. In most situations, the teacher returns to the pre-leave position or goes to some other mutually acceptable position. In some cases a teacher may be involuntary transferred to a different position.[30] Difficulty has also arisen from a teacher's premature return from a leave.[31] Finally, more recent cases suggest that returning teachers have a preference over newly hired employees for positions in the district.

Sick Leave

Introduction: The preceeding section outlined some generalized problems in the administration of leave programs; the following section discusses specific types of leave.

Chalkboard Flu: A phenomenon accompanying public sector bargaining has been the outbreak of various "flu epidemics" during negotiations. The original version was probably the "blue flu" of the various uniformed public employees. Similar "attacks" have been experienced in the field of education. A common symptom is for a large number of the members of the bargaining unit to call in sick and not report for duty during negotiations. School administrators have doubted whether the sick leave provisions have been properly used, and arbitrators have agreed:

> In an ordinary situation, the policy and practice of the Board could not have been properly changed by unilateral action. This was not, however, an ordinary situation. The sudden simultaneous sickness of so many teachers on a single day was not a coincidence. It has all of the earmarks of a job mass action...[32]

In these situations, the cases hold that the school board can require verification of illness. If evidence of verification is not presented, sick leave may be denied.[33] In one case, in which there was an acknowledged strike, the school district did not have to grant the total contractual amount of sick leave days to employers and was permitted to pro-rate the sick leaves given for the full school year over the time remaining in the school year.[34]

Illness and Disability: Contract clauses may distinguish between various physical conditions Sick leave may be defined as a relatively short illness, while a long-term disability may be given different treatment in the contract. Short-term sick leave may be paid, while a longer term disability may be unpaid.[35] One arbitrator was faced with the question of whether relatively long-term physical therapy sessions following an injury would qualify under the contract definition of sick leave. The arbitrator construed the contract liberally and permitted it.[36] On the other hand, where a teacher had a series of short illnesses resulting in exhaustion of sick leave, the arbitrator denied an argument claiming that the next illness could be viewed a continuation or extension of the prior one.[37] It is one problem for an employee to initiate a leave request for illness. It is another for the school district to require a teacher to take an involuntary leave for physical or mental resons. An arbitrator, faced with the later problem, ruled that management had the right to so direct an employee.[38]

Sick Leave and Maternity Leave: Historically, a distinction has been made between paid sick leave and unpaid maternity leave. A situation which is more difficult to categorize is one in which the disability results from childbirth. Does this situation fit into the sick leave provisions? The arbitration cases are plentiful, and the results are mixed.[39] Most of the arbitration law at this point is probably superseded by the federal[40] and state laws that have resulted from decisions of the United States Supreme Court and legislative bodies. More recent contracts will probably incorporate the rapidly changing law in this area. As is true of so many equal employment-civil rights issues, one of the major problems for the parties and the arbitrator is whether the arbitrator will look beyond the contract to the external law. Employees' absences due to pregnancy have been the subject of legislation which must be taken into account when drafting maternity leave provisions.

Accumulation of Sick Leave. The contract may provide for a limited accumulation of unused sick leave over a designated period of time. The caselaw in this area is very mixed and depends heavily upon the particular language being used. The variety of results precludes summarization at this point.[42] Mere mention of the issue at this point might be a useful reminder to the parties that extended contractual provisions might be worth negotiating.

Sabbatical Leave

Thre[illegible]oblem areas involving sabbatical leaves will be considered: (1) the school district's exercise of discretion; (2) the role of a quota; and (3) financial ability of the district to grant sabbaticals. Sabbatical leave provisions often give the school district the discretion to deny a leave request which does not appear to provide sufficient study or professional growth. The premise of sabbatical leave provisions seems to be a type of quid pro quo: the leave will be given in exchange for the teacher's taking a course of study or activity which will be of value to the school district when the teacher returns.[43] The school district's decision must be reasonable, unless the contract gives one side total, unlimited discretion.[44] When the sabbatical is for the purpose of obtaining an advanced degree, the inclusion of some undergraduate course work in the degree program should be permitted.[45] As is common in leave problems, paid and unpaid leaves may be offered[46] and a tuition reimbursement may or may not be offered.[47]

Contracts commonly include a quota on the number of sabbatical leaves permitted in a year. The quota may be a fixed number or a percentage of the faculty. An issue that may arise is whether the quota is an upper limit or whether the quota is a minimum that must be met. Assuming that the applicants qualify for a leave, arbitrators first look for clear contract language or a past practice indicating what was meant. In the absence of clear contract language, arbitrators tend to find that the quota must be filled if there are qualified applicants.[48] That is to say, the arbitrators may find the contract language on quotas to be mandatory language, i.e., a minimum to be met. The school district can protect itself by negotiating permissive contract language. Even if the quota language is found to be mandatory, the school district will commonly have the discretion to deny sabbatical applications which do not meet the contractual criteria of leave only for "professional study," "improvement," or whatever qualifying language is used.

Frequently, school districts refuse to grant sabbatical leaves on the grounds of financial inability. This defense assumes that a mandatory quota has not been filled and that qualified applicants are awaiting a leave. The basis of the school's defense appears to be the notion that a sabbatical, which is a future event, is more expendable then, for example, the payment of regular salaries. Assuming there is no language limiting sabbatical leaves, arbitrators tend to find the sabbatical clause to be as binding as any other contractual obligations. The contract can, of course, make the granting of a sabbatical contingent upon available funds.[49] Where financial problems are not listed as a reason for denying qualified applications, the district may violate the contract if it refuses to grant a leave for this reason.[50] Presumably, the school will be required to juggle other parts of its budget to accommodate this contractual commitment. In all likelihood, these cases assume that the school district is not involved in a true financial emergency. Where a true crisis exists, a different result is likely. In order to prove a true financial emergency, it would be necessary for the school district to provide solid factual evidence. A district's mere apprehension about the future will probably be inadequate.

Weather and Holidays

Weather and holidays given rise to a variety of leave requests by teachers. The factual context often involves one of two situations: (1) the teacher calls in rather than reporting for classes and requests a leave because of hazardous driving conditions; or (2) the teacher calls in rather than reporting for classes following a vacation period because of car failure or missed airline connections. Various types of paid leave may be requested to cover the absence.

Contracts may provide for "snow days," which are a limited number of leave days set aside to cover situations where the roads become impassable. Where no such provision covers the situation, the school may attempt to deduct a day of personal leave, sick leave, or the loss of pay from a teacher. The teacher may grieve in order to attempt to recoup the lost money or leave. Generally, when the school does not open because of bad weather, there is not likely to be any grievances. A problem occurs when the school opens for a short period of time in the morning and then closes. The contract may cover some of these situations and protect the teacher.[51] For example, a school opened for an hour and then closed; the arbitrator ruled that absent teachers could be charged with one fourth of a day of sick leave, not the full day the school had wanted to deduct.[52] Where a school opened but then closed by 8:30 a.m., the arbitrator ruled that a day of sick or personal leave could be charged against absent teachers with a reporting time prior to 8:30, but not against those with a reporting time after 8:30.[53] Where the school was completely closed to students, but teachers were told to report, an arbitrator ruled that absent teachers could not be docked a day's pay.[54] Related to this situation are contract clauses which measure the teacher's day in terms of the students' day, for example, requiring teachers to remain 15 minutes after the students are released.[55] Where students are dismissed early because of the weather, the teachers may not be obligated to remain until the usual quitting hour.

Often school employers announce an ad hoc policy when the contract is silent. The policy will state how the administration will view absences. If the situation is not covered in the contract, it is important that the school policy be announced in advance. A unilateral declaration of a new policy on the day of the storm may not be binding on the absent teacher.[56]

Returning later from a holiday may raise an issue under an "emergency leave" provision. Absent clear contract language, a missed airline connection or car failure may not qualify as an emergency.[57] Implicit in the decisions is the notion that a teacher takes a calculated risk in planning a last-minute return. An emergency is commonly defined as something unexpected or suddenly arising, not something that could be anticipated.

Another element in the "late return" cases is the notion that a good faith effort to overcome a weather or travel obstacle is no defense. The fact that the teacher tried different routes or made telephone calls will not necessarily prevent the loss of leave time or pay. However, a good faith effort may be a mitigating factor which the arbitrator will consider in fashioning a remedy in the case. There is an important distinction between a defense, which may permit the grievant to win, and a factor in mitigation, which may only amerliorate the grievant's penalty.

Other Leave Provisions

Personal Leave: A variety of leaves for specified purposes can be found in contracts. One type of leave is personal leave, which is a leave for "urgent affairs that cannot be performed outside of regular school hours," or "not for recreational or vacation purpose." In some cases, a similar definition has been used for an "emergency" leave. The common element is the notion of doing something that cannot be done outside normal working hours. One question about such clauses is whether the leave is a matter of right to be granted upon request by the grievant or a matter of discretion to be decided by the school district. While cases can be found both ways, probably the general rule is as follows:

> Personal leaves as contemplated by the Agreement are clearly not holidays to be taken at will or at the pleasure of the faculty member. On the other hand, personal leaves are clearly not privileges to be granted or withheld as the administration sees fit.[58]

Where such leaves are restricted to certain types of situations, the school district may properly require the giving of reasons to determine if the limiting condition is met.[59] Personal leave clauses have been validly used in a variety of different circumstances, such as, time off to visit a nursery school not open after school hours,[60] to meet one's lawyer prior to a termination hearing,[61] to attend funerals of close friends when funeral leave provisions covered only family members,[62] and to attend a job interview for a summer job.[63] On the other hand, permission has been denied to use such leave provisions for taking a car in for repairs[64] or for taking a special class.[65]

Another group of personal, or related, leave clause cases deals with the issue of using a leave to cover attendance at various legal or quasi-legal events. A common example, permitted by many personal leave provisions, is leave for jury duty.[66] However, attendance at fact-finding sessions,[67] "PERB" (Public Employment Relations Board) hearings,[68] and union meetings[69] may not be covered.

Another group of cases discuss the use of personal, or related, leave clauses to celebrate a religious holiday. Some arbitrators refuse to permit use of the emergency leave clause for religious holidays because the holiday is a regularly recurring event. Rather, arbitrators find the clause limited to unexpected events which require immediate absence and involve the teacher's well being.[70] Some contract clauses permit leaves for "religious holidays." Such clauses may not cover weddings,[71] or the travel day associated with religious observances.[72] At times, an arbitrator may inquire into the nature of the observance to determine whether it is a recognized practice.[73] When an arbitrator looks to external law for guidance, questions surrounding religious holidays can bave civil-rights overtones.[74] Furthermore, inquiry into the nature of one's religious beliefs and practices may raise First Amendment issues under the Constitution.[75]

Alternative Proposals: The exercise of discretion, permitted by contract, must be reasonable. One element of reasonableness may be an examination of other alternatives available to the teacher. Weighing alternatives appears to be particularly important when granting personal leaves, as distinguished from other types of leave. In one example, a teacher sought a paid personal leave to attend a job interview. The arbitrator found the request was properly denied because there were other alternatives available to the teacher (i.e., the use of non-school time).[76] By contrast, a request was improperly denied when the teacher sought time to see an attorney about a termination hearing. The arbitrator rejected the school's suggested alternative that the teacher could find a less busy attorney.[77]

Leaves interrupt the work schedule of the schools, and this can be a significant factor to consider in granting or denying a leave request. A requested leave which runs from September to September (overlapping the start of school) may be rejected in favor of an end of school June to June leave.[78] Where a school granted compensatory time for extra duties in an effort to avoid paying overtime, the school properly denied a leave request for "comp" time that would have required the school district to hire a substitute teacher.[79] One of the goals of the contract was to save money, hence the denial was reasonable when it reflected a reasonable consideration of that goal. A teacher requested a four-day week with a 10 percent pay reduction in order to enroll in an externship program. The school acted reasonably when it denied the request and counteroffered with a proposal for a four-day week, 20 percent pay reduction, and a normal workload.[80] An important aspect of the case was the fact the district offered an alternative rather than merely denying the request. Finally, a school properly denied a request for a travel-educational study leave when it determined that the primary purpose of the request was travel. The board relied upon the past practice of requiring formal educational objectives when granting such leaves.[81] Possibly, a more structured leave plan would have been an acceptable alternative.

Awards

A common leave dispute stems from the denial of a paid leave request. The teacher may still get the leave but in an unpaid category. If the grievance is denied, the matter ends, leaving the teacher unpaid. If the award goes to the teacher, a common remedy is to award the teacher pay for the leave period and, where appropriate, charge the leave against a paid leave category.[82] Interest on the salary will not normally be paid.

> The District is not required to pay interest...Since there is no evidence...that would indicate any willful or capricious actions were involved or that the proceedings were unduly delayed.[83]

A variety of other remedies are also available. Where reasons for the request were improperly required, a cease-and-desist type of remedy might be included.[84] Where an unreasonable procedure is used for reporting illness, a cease-and-desist type of remedy may also be appropriate.[85] In some situations, merely a declaration of rights and no monetary award has been deemed appropriate.[86] The improper denial of a sabbatical leave may result in other types of remedies. Where there has been an improper refusal to consider the application (e.g., for budgetary reasons), the award may require evaluation of the applications and granting sabbaticals where appropriate.[87] Where the sabbatical leave can no longer be taken (e.g., a summer sabbatical) because of the passage of time, the arbitrator might require the parties to negotiate a settlement, and retain jurisdiction to enforce the agreement.[88]

In some situations, a leave may be denied, but the teacher is absent anyway. The school district may then take some form of adverse personnel action. The arbitrator may subsequently find that the original denial violated the contract. Awards in such cases include payment,[89] and removal of any references to discipline from the teacher's personnel file.[90] In other situations, the arbitrator may find that the teacher's absence was not covered by the leave provisions, but the penalty imposed by the school district was too harsh in light of mitigating circumstances. The arbitrator may then award a diminished penalty.[91]

Conclusion

Leave cases often involve unique individual facts and unique contract clauses and, therefore, a given case may or may not represent a meaningful guide or precedent for the parties. Another important element in a leave case is the bargaining history of the contract clause, and the past practices in the district. Leave issues are very common in arbitration. While it certainly would not apply to every case, one arbitrator described part of the problem in this fashion:

> The parties to this agreement must recognize that the personal leave clause in this contract can be a constant source of dissension....Had the district acted differently in the past and not allowed two other teachers to use personal leave for field trips or had there been a more definite understanding between the parties as to the meaning of personal pleasure, this arbitration would have never come about.[92]

Consequently, in multi-year contract, leave provisions which are subject to frequent use should be negotiated with great care and drafted with particularity.

Administrators have discretion in making decisions on leave requests. The exercise of this discretion will be subject to a review for reasonableness. Reasonableness requires the application of known facts (not assumed facts) to the contract criteria. Reasonableness requires a considered and not a summary judgment. Reasonableness also requires an adequate procedure.

The contract both grants and limits the leave benefit. Teachers must make application according to the terms of the contract. The leave application must be made with a realization that the criteria is found in the contract and not in the personal crisis of the teacher.

Footnotes

1. 92 AIS 1. See also 90 AIS 15.
2. 95 AIS 18.
3. 112 AIS 17.
4. 60 AIS 4.
5. 98 AIS 17.
6. 71 AIS 8. See also 98 AIS 2.
7. 59 AIS 4.
8. 98 AIS 13.
9. 114 AIS 2; 94 AIS 6.
10. 67 AIS 11.
11. 97 AIS 5.
12. 115 AIS 5.
13. 71 AIS 12.
14. 79 AIS 17.
15. 114 AIS 23.
16. 91 AIS 8. See also 88 AIS 3.
17. 80 AIS 17. See also 59 AIS 4.
18. 64 AIS 22.
19. 70 AIS 3.
20. 116 AIS 11.
21. 73 AIS 2.
22. 104 AIS 11.
23. 84 AIS 4.
24. 98 AIS 13.
25. 100 AIS 23; 75 AIS 10.
26. 96 AIS 22; 71 AIS 12.

27. 112 AIS 8.

28. 109 AIS 11.

29. 95 AIS 11. See also 79 AIS 4; 62 AIS 16.

30. 98 AIS 13.

31. 87 AIS 18; 72 AIS 10.

32. 57 AIS QL-1.

33. 109 AIS 10; 97 AIS 3; 72 AIS 9.

34. 96 AIS 13.

35. 72 AIS 22; 71 AIS 2.

36. 105 AIS 18.

37. 83 AIS 22.

38. 95 AIS 6.

39. Sick leave available: 110 AIS 20; 91 AIS 16; 74 AIS 6; 72 AIS 21. Sick leave not available: 103 AIS 5; 86 AIS 6; 75 AIS 18; 74 AIS 18; 70 AIS 23.

40. Civil Rights Act of 1964, 42 U.S.C. §2000(K) (Supp. 1980).

41. E.g., Ore. Rev. Stat. §659.029 (1979).

42. E.g., 94 AIS; 85 AIS 1; 77 AIS 4; 73 AIS 5.

43. 85 AIS 1.

44. 85 AIS 5.

45. 91 AIS 23.

46. 77 AIS 19.

47. 77 AIS 7.

48. 96 AIS 12; 94 AIS 15; 73 AIS 24.

49. 94 AIS 12.

50. 79 AIS 9; 73 AIS 24; 70 AIS 13.

51. 115 AIS 4; 80 AIS 19.

52. 105 AIS 15.

53. 71 AIS 3.

54. 111 AIS 7.
55. 113 AIS 1.
56. 96 AIS 20.
57. 115 AIS 4; 102 AIS 13; 89 AIS 1; 60 AIS 4.
58. 82 AIS 10. For a contrary interpretation, see 73 AIS 18.
59. 75 AIS 21.
60. 75 AIS 19.
61. 109 AIS 2.
62. 80 AIS 10.
63. 96 AIS 9.
64. 115 AIS 2.
65. 74 AIS 4.
66. 70 AIS 8; see also, 100 AIS 10.
67. 105 AIS 6.
68. 85 AIS 7.
69. 56 AIS KX-1.
70. 78 AIS 15; 55 AIS AL-5.
71. 104 AIS 3.
72. 85 AIS 3.
73. 91 AIS 19.
74. Civil Rights Act of 1964, 42 U.S.C. §2.000 e-2 (Supp. 1980).
75. NLRBV. Catholic Bishop of Chicago, 440 U.S. 480 (1979).
76. 72 AIS 16.
77. 109 AIS 2.
78. 92 AIS 1.
79. 100 AIS 7.
80. 72 AIS 5.

81. 85 AIS 2.

82. 105 AIS 15; 104 AIS 2; 96 AIS 22; 96 AIS 20; 80 AIS 19; 72 AIS 22.

83. 95 AIS 18. See also 96 AIS 22; 96 AIS 20.

84. 104 AIS 2.

85. 116 AIS 11.

86. 80 AIS 10.

87. 94 AIS 6; 79 AIS 9; 73 AIS 24; 70 AIS 13; 67 AIS 11.

88. 94 AIS 15.

89. 73 AIS 18.

90. 91 AIS 8; 73 AIS 18.

91. 75 AIS 10; 71 AIS 22.

92. 88 AIS 8.

SCHOOL ARBITRATION: WHAT THE ARBITRATORS ARE DOING

Chapter 6 - Evaluation

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Introduction

The evaluation of school personnel was one of the more numerous grievances found. Of nine issues considered, evaluation was the third most commonly occurring. Of 840 awards, fourteen percent raised evaluation disputes of some form. Four-fifths of these evaluation grievances were filed by individuals, while the remainder was filed by a class. Men and women are equally likely to file individual evaluation grievances, although women won 67 percent of the grievances they filed and men won only about 50 percent of their claims.

For present purposes, evaluation is defined as the performance appraisal of school employees. These evaluations can serve a multitude of purposes, including providing the rationale for making employment decisions, providing suggestions for improving work performance, and establishing a record of performance for future employers. It is because an employee's evaluation serves such a variety of purposes that it is of great importance to the employee and employer.

An arbitrator has defined the evaluation process as follows:

> The undersigned finds that the "evaluation process" contemplated...[by the contract] must of necessity constitute such a procedure as is reasonably calculated to produce enough facts upon which to base an informed opinion.[1]

The evaluation process is, from one point of view, a means by which employers let their employees know where they stand.[2] A negative evaluation may lay the foundation for future employment decisions such as non-renewal, termination, suspension, discharge, or dismissal. An evaluation may contain suggestions for improving work performance which may be based, in part, on evidence that indicates a developing dissatisfaction with the employee's performance. And, generally, it is only at some later point in time, when the employee fails to improve, that the more severe actions of non-renewal, suspension, dismissal or discharge may occur. The evaluation process may be seen as a "helping" process by identifying weaknesses, Later it could become a part of the basis for a personnel decision adversely affecting the employee. Many arbitrators consider the evaluation process, at most, a warning to serve as an incentive for better performances and not a means for disciplining an employee.[3] Consequently, disciplinary actions are separable from the evaluation process. They are linked, however, in that the same dissatisfaction with performance may be expressed both in the employee's evaluation and in the disciplinary process. Some arbitrators have upheld the use of the evaluation process to deal with alleged difficulties with the emotional and personality traits, and the lack of professional qualities of an employee rather than using disciplinary procedures.[4]

A discussion of evaluation disputes requires a common definition of certain terminology.

1. Probationary teacher: an employee hired under a limited term term contract. At the end of this probationary period - often 2-3 years - a decision must be made as to whether the teacher should be given tenure or some form of job security.

2. Contract renewal or non-renewal: an agreement to renew a fixed term contract at its expiration. Contract non-renewal is the failure to offer another fixed term contract. Non-renewal is commonly used in the context of probationary teachers and is to be distinguished from discharge or other forms of contract termination.

3. Contract reappointment: similar to contract renewal, but it is a phrase more commonly used in colleges and universities.[5] Higher education contracts may be reappointed on a term by term basis, on a year by year basis, or for a period of years by another period of years.[6] Reappointment has been used in the public school sector to refer to he assignment of extra duties, such as coaching,[7] the selection of staff for summer session teaching,[8] and the selection of a department head.[9]

4. Termination: a general term which may signify either the end of a contract for employment or the end of selected services, such as extra duty coaching assignments. The term is broad enough to include employment ending at the close of a contract[10] or mid-contract.[11] It is a term used when referring to both probationary and tenured employees.[12]

5. Suspension: the release of an employee from job duties for a period of time with the option of returning to work at the end of the period.[13] The reasons for suspension are numerous and varied and often an issue in arbitration.

6. Dismissal and discharge: terms that relate to employee discipline issues. An arbitrator has defined a discharge as follows:

> ["D]ischarge" is an event occasioned by the action of the involved employee. It is generally...coupled with or [is]...the final effect of discipline.[14]

General Issues

Access to Files: Employees have been given the right to review their personnel files, with some exceptions. An award found a teacher was improperly denied access to a medical report in the employee's file. The arbitrator granted the employee the right to review the report because it could affect one's livelihood.[15] Another teacher was granted a similar right to review a psychiatrist's report, however, he was not entitled to see an additional report prepared by the principal, sent to the superintendent, and placed in the superintendent's personal files. The arbitrator distinguished this information because it had not been placed in the grievant's files and the contract only protected teachers from damaging information placed secretly in their files.[16] By contrast, a non-tenured teacher did not receive similar protections. The employe did not violate the contract by placing materials in the grievant's file without the employee's knowledge and without a chance to respond to the information. The materials served as the basis of a later non-renewal decision by the district. The arbitrator noted that the contract did not quarantee disclosure to the grievant. The union was also unable to prove that the documents were unjust or inaccurate.[17]

Academic Freedom: Academic freedom includes the right of teachers to engage in the process of educating students as they deem most appropriate. This assumes only a limited amount of intrusion by the employer into the affairs of the classroom. Initially, the issue of academic freedom was indentified as a separable issue for analysis in this study. However, the number of awards raising the issue were surprisingly small. Academic freedom issues frequently are raised in connection with other issues, such as evaluation. Accordingly, the academic freedom issue will be discussed here under the rubric of general issues affecting evaluation and management of school personnel.

A small number of awards discussed the issue of academic freedom. They amount to less than one percent of the cases studied. The cases identified tended to focus more of their attention on issues other than academic freedom. The contract may provide that the teacher's constitutional rights shall not be abridged, allowing the arbitrator to focus on the first amendment rather on academic freedom. Another clause in the contract may give limited protection to the teacher who speaks critically of the school district. The arbitrator may focus on the later type of clause rather than on the broad contract clause guaranteeing constitutional rights.[16a]

In one case, a teacher had invited two homosexuals to speak to the class. The school required the teacher to cancel the invitation. The arbitrator stated that it was not an academic freedom issue, but rather it involved the interpretation of the contract provision prohibiting the school from putting special limitations on teachers. The award in the case was particularly broad. The teacher would be permitted to invite two speakers without limitation If a termination question about the teacher arose in the next three years, the burden would be put on the school to show it was unrelated to this incident. Finally, the parties were to negotiate procedures about outside speakers, with the arbitrator retaining jurisdiction in the event of an impasse.[18]

In another remarkable case, undercover police personnel were in classes to investigate the students. The police were not directed to report on the teachers, but the police, nonetheless, made reports on them. The arbitrator stated at one point:

> The arbitrator finds that the academic freedom of the teachers may have been on the verge on being abridged...A further expansion of the agent's investigation and any reckless exploitation of her reactions might have caused serious repercussions. Fortunately, the overreactions and exploitation did not occur.[19]

On the other hand, a teacher who engaged in religious proselytizing in class was found to be properly suspended. The teacher had been warned and progressive discipline had been employed.[20] Academic freedom would offer no protection.

A series of other acts by schools was found not to violate rights to academic freedom. Evaluation of lesson plans is permissible.[21] The school may override the department head's policies. The arbitrator noted that no one had curtailed the department head's right to express views or interferred with appeals to the superintendent.[22] Requiring the use of a department-wide "consensus" final examination was found to be no violation where the final grade reflects the individual teacher's decision.[23]

The few cases provide little guidance in the academic freedom area. One reason for this appears to be that arbitrators are more at ease interpreting more tradition clauses, such as the protection of explicit rights given in external law. Another reason appears to be that teachers have tried to use the notion to cover inappropriate situations. If academic freedom issues are to be given serious consideration, it would appear to require more explicit clauses which would then give greater guidance to both the teachers and the arbitrator. As it now stands, it appears that arbitrators would rather avoid deciding a case on academic freedom grounds.

Sources of Information: In some instances, the evaluation of an employee may be based, in part, on third-hand information or hearsay. A teacher received a negative summary evaluation from the principal. The evaluation was based, partially, on informal negative comments and incidents occurring inside and outside the classroom. The principal had never visited the grievant's classroom. The principal had never visited the grievant's classroom. The arbitrator ruled that the board did not have to remove the evaluation from the files because evaluations do not need to be based solely on classroom teaching performance.[24] The arbitrator made no point of discussing the evaluation's reliance on hearsay information. Consequently, the use of hearsay information, in a similar context, appears appropriate.

Another award has upheld the employee's right not to be evaluated on participation in school activities or duties which are voluntary. An evaluation noted an employee had refused to participate in coaching girls' extra-curricular sports when the school needed her to satisfy legal mandates under Title IX of the Education Amendments of 1972. The arbitrator ruled that she had no obligation to perform the services under the contract, therefore it was a voluntary activity and it was improper to note the grievant's refusal to participate in her evaluation.[25] Therefore, if the contract does not require the employee to perform particular duties then the employee cannot be evaluated on them.

In another case, a district was prohibited from soliciting parental input in evaluating teachers. The district had sent evaluation forms to student's parents to evaluate the teachers. The practice was impermissible under the contract which designated certain persons in the school with the responsibility for conducting teacher evaluations.[26] Interestingly, the evaluation form had a category for rating the teacher's teacher-parent relationship and, as a result of the arbitrator's decision, the designated evaluator will now have less direct feedback upon which to base the rating.

Reorganization and Evaluation: A few decisions involved attempts by schools to change programs which were later interpreted by arbitrators as unsuccessful attempts to remove unwanted personnel. A district terminated a probationary teacher, abolished the teacher's position and created a new one with similar duties. The arbitrator reinstated the grievant to the new position and relied on a state law requiring "the person filling such...position at the time of its abolishment shall be appointed to the office or position thus created."[27] In another case, a board violated the just cause provisions when it dismissed a teacher by abolishing a program. The arbitrator gave severance pay to the grievant and said:

> ...Downsville is a small rural school district with a number of prominent members of the board of education involved in farming. They were especially interested in the grievant's program. In their eyes, he did not measure up nor did he promote the program as they felt he should....
>
> The evidence...weighs heavily in favor of the association's contention that the district used the legal argument of abolishing the program, after it realized it would not be able to encourage the grievant to resign and recognized it had not met the contractual requirements in regard to evaluation and just cause.[28]

Consequently, the termination of unwanted employees must follow the evaluation process and the just cause provisions in the contract before ending an employee's employment.

Limited Term Contracts: Automatic termination is a term used by an arbitrator to describe the situation in which an employee agrees at the time of hiring to perform a particular task. The employee is automatically terminated when he/she fails to complete the task. Consequently, when a grievant failed to complete a particular college course, the grievant could be automatically terminated and was not entitled to a discharge for cause.[29] In another award, a college did not violate the contract when it refused to reappoint the grievant to his position because he had not obtained his Ph.D. as agreed at the time of hiring. Although the grievant was a good teacher, his contract required him to demonstrate to the school that he expected a terminal degree in his discipline.[30]

Time Period of Evaluation: Occasionally, the appropriate evaluation period to be considered, when making non-renewal decisions, has been discussed by the arbitrators. In one award the board looked only at negative information collected on an employee over the last two months and ignored the three year record of above average work by the grievant. The arbitrator sustained the grievant's case and said:

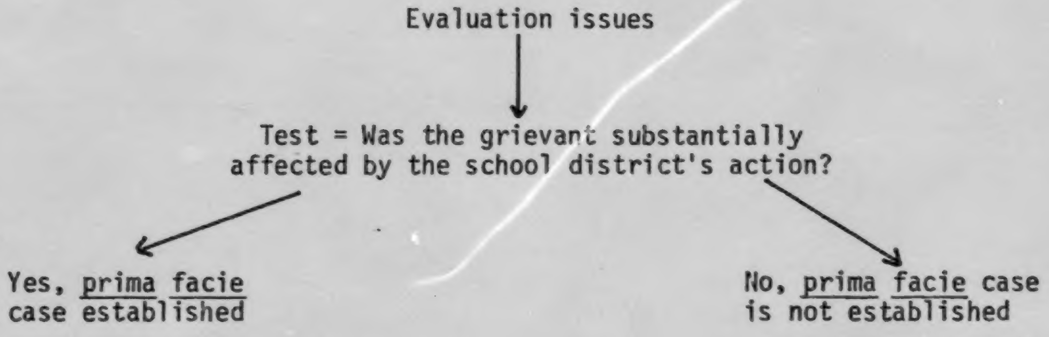
> The specific practical effect of ignoring the Grievant's 2 1/2 years of teaching...was to reduce her probationary period to only two months....[31]

Another award has discussed the relevant evaluation period in a different manner. A teacher had a one year contract to teach his first year in the district. He was sent a non-renewal notice well in advance of the end of his contract, March 1st. The arbitrator ruled that the school board could not limit its evaluation of grievant's performance to the period ending March 1st. The grievant had made improvements after the March 1st notice date and, although the evaluations had reflected the improvements, the board had ignored them in deciding not to renew the grievant's contract. The evaluation period must be in the entire school year and the improvements should have been considered in the renewal decision.[32]

Proof and Procedure

Prima Facie Case: To establish a *prima facie* case of a violation of employment rights, employees must show that they have been adversely or substantially effected by the alleged violation. The "substantial effects" test asks whether the alleged violation had any effect on the grievant. If there is no substantial effect on the grievant by the district's violation, then the grievant has not made out a claim. The following figure depicts the test for determining whether an initial claim has been articulated in the grievant's complaint.

Diagram of the Test Used in Establishing A Prima Facie Case in Arbitration



Evaluation issues

Test = Was the grievant substantially affected by the school district's action?

Yes, *prima facie* case established

No, *prima facie* case is not established

An arbitrator articulated the test when discussing procedural defects in a grievant's non-renewal:

> Grievant does not apparently contest the substance of the Evaluation of March 6,...but the procedures followed, however, in such attack there must be some showing of the effect on the substance else there can be no basis for practical relief....The core question...is: was grievant treated fairly....To answer this question one must look for the effect of the alleged violation, if any, upon grievant. One looks in vain for such. In fact, the evidence would appear to be there was no substantial effect upon grievant even if there were a finding there were violations of procedures for evaluating grievant....Here there was no showing that grievant was not accorded essential fairness in her evaluation.[33]

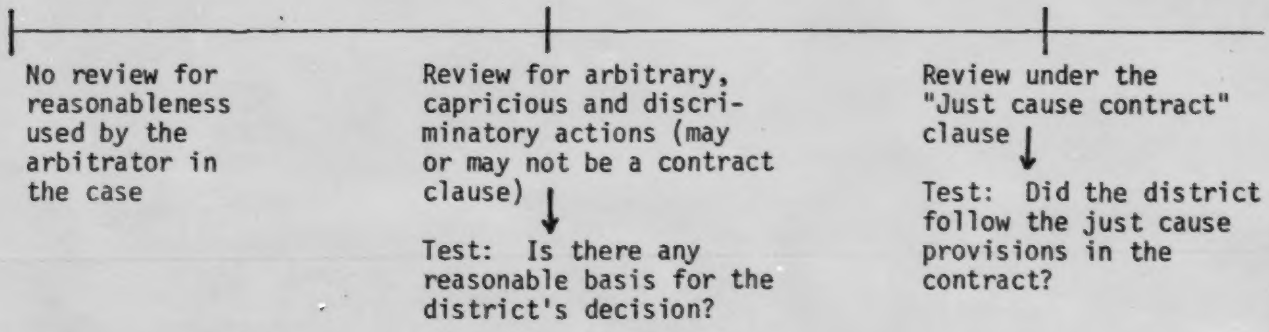
The same test has been applied when reviewing a discipline dispute. The arbitrator wrote as follows:

> In the event that a reprimand is given without just cause, or discriminatorily, or in the absence of procedural requirements, the appropriate remedy would be expungment of the aggrieved employee's record. In this case there is no record to be expunged. There was no authorized discipline enacted against Grievant. At the minimum, in order to constitute a disciplinary reprimand, the interview must be at the direction of or under the authority of the Assistant Superintendent of Personnel. It must in some way adversely affect the disciplined employee's job security, or at least his reputation with the Board. The occurrence giving rise to this dispute does not meet any of the foregoing requirements....Grievant was subject to no formal discipline....[34] (Emphasis added.)

Standard of Review: Once the grievant has established a *prima facie* case the arbitrator must determine the appropriate standard of review for the dispute. In evaluation disputes this review generally involves the application of a test for reasonableness. The reasonableness standard is a sliding scale which ranges from no review for reasonableness (i.e., school permitted to do what it wants) all the way to a determination of whether the employer followed the just cause provisions in the contract. The following figure illustrates the standard of review in evaluation disputes.

Diagram of Reasonableness Standard of Review

Reasonableness Standard of Review



No review for reasonableness used by the arbitrator in the case

Review for arbitrary, capricious and discriminatory actions (may or may not be a contract clause)

Test: Is there any reasonable basis for the district's decision?

Review under the "Just cause contract" clause

Test: Did the district follow the just cause provisions in the contract?

At one end of the reasonableness scale there is little or no review by the arbitrator. Occasionally, arbitrators refuse to apply any form of the reasonableness test to the employer's actions. One such arbitrator, in declining to review a grievance for reasonableness, stated the following:

> The Contract does not have a just cause provision and the fairness of the District's action...is not a ground on which the decision can be set aside.[35]

The mid-point on the scale requires some form of review. Several evaluation disputes involved the application of the arbitrary, capricious, and discriminatory form of reasonableness. For example, a school district was found to have followed the contract and gave sufficient notice to the grievant of dissatisfaction with performance. There was no evidence that the decision was arbitrary, and the grievance was denied.[36] Other arbitrators have termed the arbitrary, capricious and discriminatory standard of review a test for "simple fairness." An arbitrator expressed the test in determining a teacher was improperly denied a medical report in the school's personnel files. He said:

> Simple fairness...would require that an employee be permitted to review material which may serve as the basis for affecting that person's livelihood.[37]

In another case, an arbitrator found a "covenant of fair dealing" to be implicit in evaluation procedures.[38] The review for arbitrary, capricious, or discriminatory actions attempts to determine whether the actions of the employer are reasonable. Any one of several reasonable responses is sufficient to uphold the employer's actions. The test is one of mere reasonableness, not one requiring a "more" reasonable response or the "most" reasonable response available to an employer.

The most stringent review on the scale is to determine whether the employer has abided by the just cause provisions of the contract. While the arbitrary, capricious, and discriminatory standard may be implied in the terms of the contract, a review for just cause for a personnel decision normally requires a written clause in the contract. These just cause provisions delimit the reasonableness test by setting out what is considered a reasonable means of making changes in an employee's status. Consequently, not simply any reasonable response by an employer is acceptable, when making an employment decision which affects an employee, protected by the just cause provisions of the contract. A reasonable response to such employees is a response which follows the just cause provisions. The just cause provisions are a written codification in the contract of fairness and reasonableness when making personnel decisions. Consequently, just cause protections trigger certain protections which must be afforded an employee before the employer's actions will be upheld in arbitration. One award found just cause under the contract required:

> 1. Did the Grievant have timely and specific notice of the "limitations or failures" that were considered....?
>
> 2. Did the School Board fairly and objectively investigate and evaluate the Grievant's performance on the basis of the "limitations or failures....?"
>
> 3. Was the sanction of non-renewal reasonable in light of (a) product of the Board's investigation and evaluation; and (b) the Grievant's record of employment with School District?[39]

Another arbitrator articulated an eight step approach to a just cause provision. A "no" answer to any one of the eight questions signified just cause was not present. The eight questions were as follows:

1. Did employer forewarn employee of possible consequences of conduct?
2. Was rule or order involved reasonably related to orderly, efficient, and safe operation of business?
3. Before administering discipline, did employer make an effort to discover whether employee did, in fact, violate or disobey rule or order?
4. Was employer's investigation conducted fairly and objectively?
5. In investigation, did employer obtain sufficient evidence or proof that employee was guilty as charged?
6. Has employer applied its rules, orders, and penalties even handedly and without discrimination?
7. Was degree of discipline reasonably related to seriousness of offense and employee's record?
8. Was the employee given an opportunity to correct her conduct?[40]

As indicated above, some of the usual elements in a just cause provision include notice, warning, opportunity to correct, and first-hand information. Common to even the most rudimentary just cause provision is the requirement of notice to an employee. An arbitrator stated it simply:

> Just cause calls for some personal notive of unsatisfactory performance and its consequences before more drastic action may be taken.[41]

If employees are not given adequate notice of their shortcomings the employer's actions may not be upheld in arbitration. For example, a district's actions were found to unreasonable, when it discharged an employee without forewarning.

> The arbitrator also finds that the District's actions in discharging the Grievant was unreasonable and capricious in that it was unpredictable, unexpected and taken without warning. The District and its agents did not provide the required formal evaluations in a timely fashion, did not counsel on any observed deficiencies so that they could be remedied, and did not adequately advise the Grievant that his job was in jeopardy.[42]

In addition to adequate notice of deficiencies, the above excerpt articulates another common protection in just cause provisions--the chance to remedy observed deficiencies. An award concerning the discharge of an employee for cause expands the notion:

> ...labor jurisprudence has developed certain precepts of fairness to the employees wherein some reasonable attempts should be made to assist and aid the employee functioning below acceptable standards...it is encumbent upon the employer to let it be known to the employee that there is dissatisfaction with the employer, acting in good faith, should counsel and even teach, if necessary, how the employee can perform the required tasks in an acceptable manner. If the employer has clearly communicated this evaluation...and if the employee does not improve...then the employer is justified in imposing discipline.[43]

Just cause provisions have also been interpreted by arbitrators to require the use of direct observations when conducting an evaluation. A school board violated the contract in its evaluation of a teacher when an evaluator gave an unsatisfactory rating to her without basing the judgment on actual classroom observations. The rating was allegedly based on the teacher's inability to control students, however, the conclusion was not supported by actual classroom observations and therefore the evaluation was not supported by just cause.[44]

Another arbitrator has stated that just cause for an employment action may not be based on "immutable personality traits" of an employee, apparent to the employer at the time of hiring. The award sustained the grievant's claim and stated the rule as follows:

> While it may be true that Mrs. Johnson has not enjoyed a friendly and satisfactory relationship with students in her classes and was regarded by many parents and students as "crabby," such personality traits...certainly do not establish just cause for severe disciplinary measures. Certainly it does not establish just cause for imposing such sanctions without prior warning and without a chance to correct such personality traits.

> The evidence indicates that these personality traits were apparent in Mrs. Johnson's relationship with her classroom students from and after the first year of her teaching.[45]

Substantive and Procedural Issues: In arbitration, two general types of evaluation disputes are disputes regarding the substance of the evaluation and disputes over the procedures used to make an evaluation. Substantively, arbitrators have been asked whether a large number of individually trivial infractions may serve as the basis for a dismissal;[46] whether several absences from work may be grounds for termination of an employee;[47] and whether an employee can be evaluated on the performance of duties not required by the contract.[48] Procedural issues include whether an employee has the right to know the reasons for the nonrenewal of his/her contract;[49] whether appropriate notice was given before an employee was terminated;[50] and whether an employee has the right to review one's personnel files to read such things as medical reports.[51]

The review of procedural issues in arbitration is often a relatively straight-forward process, while the review of substantive issues is, at times, more problematic. Resolving procedural issues first requires an examination of the contract provisions on evaluation procedures and then a determination of the actual procedural steps taken in evaluating a particular employee. If the contract steps were followed the grievance is denied, if the steps were not followed the grievance is sustained.

When dealing with substantive evaluation issues arbitrators are generally loathe to make any changes in an employee's performance evaluation because they do not have sufficient facts or insights into the employee's performance to make a decision as to how an employee should be rated in an evaluation.[52] As a result, they will review the substance of an evaluation, and, if some form of "reasonableness" supports the decision, the evaluation will stand regardless of whether the arbitrator personally agrees or disagrees. If the employer's decision violates some form of the reasonableness standard of review, the arbitrator may expunge the defective evaluation from the grievant's file[53] or require a statement to be attached to the evaluation explaining its erroneous aspects.[54] Difficulty arises when, on the one hand, the contract requires the arbitrator to review for reasonableness, and on the other hand, not to substitute the arbitrator's judgment for that of the employer. An arbitrator stated the problem as follows:

> The undersigned arbitrator frankly remains puzzled on how to reconcile fully the contract commands not to consider the merits of the President's rejection or the faculty judgment but to determine whether the President's rejection was given for compelling reasons written in detail which are not arbitrary and capricious. The matter has reached arbitration, however, and the arbitrator is required to make the determination he is instructed to by the agreement.[55]

Some arbitrators have voiced a need to review the substance of an evaluation more closely. An arbitrator discussed the rationale for examining the merits of an evaluation in arbitration:

> The fact that these observations and evaluations can be used to support charges of incompetency (albeit tried in another forum) leads me to conclude that a tenured teacher has a contractual right to test their legitimacy before they become a part of his or her record. Moreover, there is a practical, as well as contractual, basis for having such matters litigated at a time near their occurrence instead of waiting until some time in the future when memories are unreliable or witnesses unavailable.[56]

Another arbitrator has even gone so far as to make a substantive change in the overall performance rating of an employee. The arbitrator found improper evaluation procedures were used, voided the grievant's evaluation, and gave the grievant a "satisfactory" rating for the year, instead of an "improvement necessary" rating.[57]

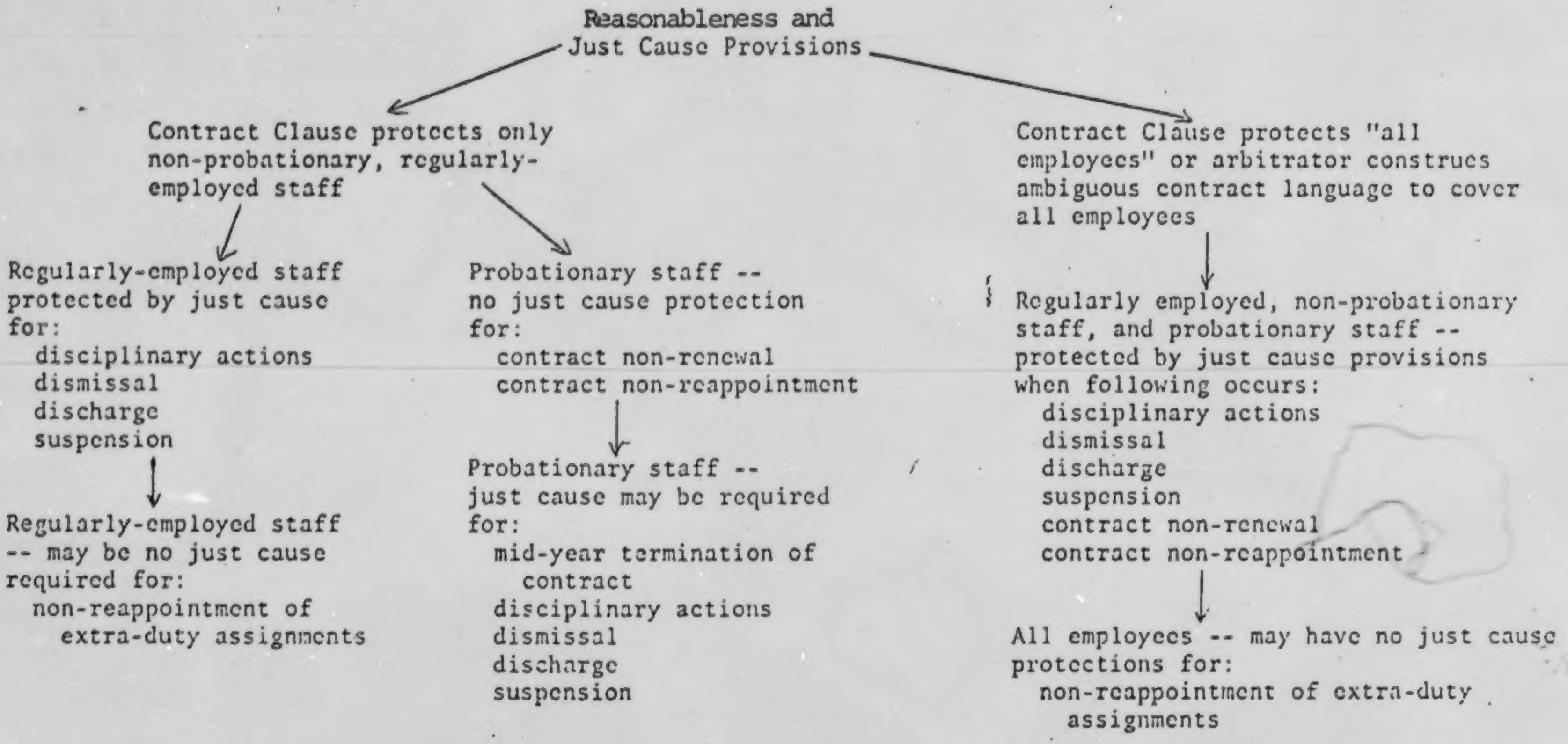
Review of the substance of an evaluation takes place on a sliding scale. The mid-point on the scale - arbitrary and capricious - is the most level of review. Some contracts may contain a provision for just cause review of the evaluation process. Just cause review is a more stringent review than is a review for arbitrariness and capriciousness. This closer scrutiny expands the arbitrator's power to look at the merits of an evaluation. However, the closer the arbitrator comes to examining the substance of an evaluation the less willing or able the arbitrator may be to substitute the arbitrator's judgment for that of the employer.

Application of the Reasonableness-Just Cause Provisions

This section discusses the application of the reasonableness-just cause provisions to particular groups of employees. The just cause provisions are of critical concern because they may directly affect the grievant's chances for a favorable outcome in arbitration.

The contract initially defines who and what is protected by the contract. Various classes of employees may receive different amounts of protection under the contract, and various job assignments may also receive varying amounts of protection. Where the contract so states, just cause must be provided before altering an employee's employment status on job assignments. In areas where there are no contractual protections of just cause, it must be determined what rights and protections an employee may have to a particular job or job assignment. The following diagram outlines various combinations rights and protections afforded employees by different types of contract provisions. The diagram also serves as the basis for a discussion which follows on the application of the reasonableness and just cause provisions of the contract.

Regularly Employed or Tenured Staff: Generally, regular or tenured employees have the protection of the just clause provisions. Typically, just cause if required for disciplinary actions, dismissal, or discharge of regularly-employed staff. Contract language frequently requires the existence of just cause before taking a disciplinary action. Discipline is an issue which merits considerable discussion. Therefore, a separate chapter deals exclusively with the subject. Suffice it to say here that the just cause provisions are, traditionally, a major consideration when disciplining employees.



Reasonableness and
Just Cause Provisions

Contract Clause protects only non-probationary, regularly-employed staff

Regularly-employed staff protected by just cause for:
  disciplinary actions
  dismissal
  discharge
  suspension

Regularly-employed staff -- may be no just cause required for:
  non-reappointment of extra-duty assignments

Probationary staff -- no just cause protection for:
  contract non-renewal
  contract non-reappointment

Probationary staff -- just cause may be required for:
  mid-year termination of contract
  disciplinary actions
  dismissal
  discharge
  suspension

Contract Clause protects "all employees" or arbitrator construes ambiguous contract language to cover all employees

Regularly employed, non-probationary staff, and probationary staff -- protected by just cause provisions when following occurs:
  disciplinary actions
  dismissal
  discharge
  suspension
  contract non-renewal
  contract non-reappointment

All employees -- may have no just cause protections for:
  non-reappointment of extra-duty assignments

Regularly-employed staff have attempted to argue in arbitration that just cause should also be provided for the non-reappointment of extra-duty assignments. This attempted extension of the just cause provisions has generally failed. The typical situation involves a tenured teacher who may have the extra-duty assignment of coaching the football team each year. This assignment may be granted through an individual, supplemental contract. The issue raised is whether the employee is entitled to advance notice and a statement of the reasons why the duties will no longer be assigned to the employee.

In one case, a coach's individual contract was not renewed due to conflicts with his supervisors. He was not entitled to just cause protection for the loss of his extra-duty assignments. The arbitrator reasoned that the non-renewal of extra-duty assignments is not a disciplinary action which is entitled to just cause.[58] Another arbitrator reiterated this view by giving the district the right to terminate a one-year, supplemental contract for a football coach, at any time, without just cause.[59]

An employee may expect to be reappointed to an extra-duty assignment because of a past practice of automatically reappointing staff to extra assignments. In one award, the arbitrator noted the past practice of automatically reappointing employees, unless the teacher was given a statement of the reasons for the removal of the duties. The parties had negotiated a new contract and the school district had established a new policy of not giving reasons for non-reappointment. The new policy had not been properly promulgated and the grievant was unaware of the change in practice. The arbitrator ruled that he was to be reappointed for next year, thereafter the board could reappoint him or appoint someone else.[60]

Often an extra duty assignment will be viewed as a fixed term contract that automatically terminates at the end of the school year. Such automatic termination is not viewed as a process which requires an evaluation prior to termination. As non-reappointment to such an extra duty position does not require an evaluation, neither reasonableness nor just cause may apply in a given situation. However, if reasons for non-reappointment are required, however, an evaluation may be required. An arbitrator granted a teacher the right to know the reasons for his non-reappointment to teach summer school classes. The arbitrator found a due process right, within the contract clause on "Promotional Policy,"to know the reasons for non-reappointment. The arbitrator examined the intent of the clause and expanded it to cover job assignments for which added compensation is provided, i.e., summer school.[61]

Probationary Employees: Many arbitration awards in the evaluation area involved probationary employees and their non-renewal or non-reappointment. Typically, these employees are not covered by the just cause provisions in the contract. These clauses normally protect only regularly employed personnel who have completed a probationary period of employment. An arbitrator stated the general rule:

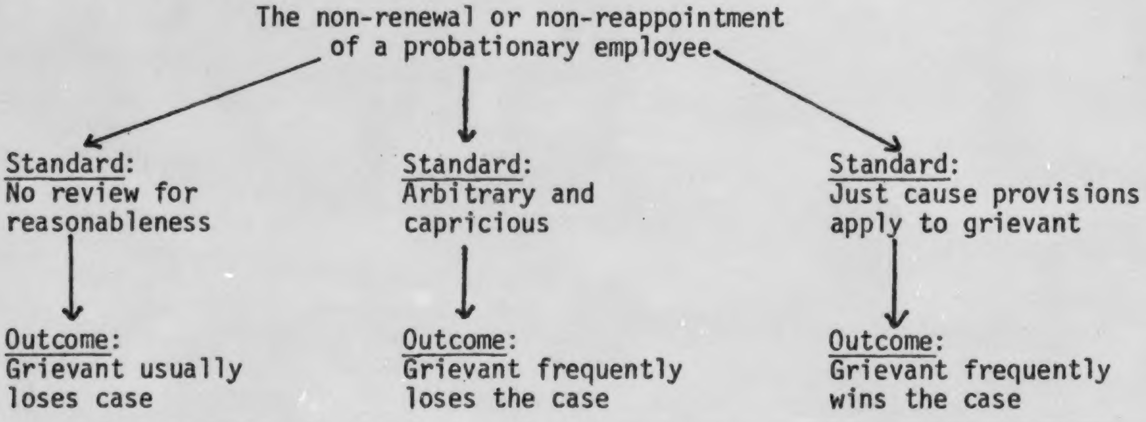
> There is considerable controversy whether the occasion of a failure to renew a probationary teacher's employment is such an event as carries with it the need for employer conformity with those standards requisite in the traditional just cause matter. The traditional just cause matter, arising as it did from the private sector labor relations, is generally referable to action by the employer for disciplinary actions arising from employee breach of appropriate employee conduct. Breaches of rules of employee conduct may consist of incompetence, tardiness, absenteeism or more serious breaches of employee conduct, in some cases tantamount to a crime. Historically, the "just cause" process

> becomes operative when employees reached such a status of permanency of employment, that is when the employee has completed his or her probationary period. It is often, if not generally, found that during the period of probationary employment the employee can be dismissed or discharged with or without reason, or for any cause short of those that are prohibited because of their proscribed discriminatory tenor.

Although probationary teachers may not have the protection of the just cause provision in the contract, nevertheless, arbitrators have held that non-renewal of these employees must be done fairly and reasonably. However, as this is a less stringent standard of review than just cause, grievants afforded this protection frequently lose their cases in arbitration.[63] In another group of awards arbitrators have refused to apply any form of the reasonableness standard of review when concerned with the non-renewal of probationary teachers.[64]

Some arbitrators construed contracts in which the just cause provisions applied to the probationary staff. When so interpreted, school districts typically will have to meet a heavy burden of proving adequate procedures were used in non-renewing the employee and they frequently lose the case. Consequently, the outcome of an evaluation dispute for probationary employees often hinges on whether they are entitled to the protections of the just cause provisions in the contract. If so protected, the chances for winning the grievance increase for the grievant. If the arbitrary, capricious, and discriminatory standard of review is applied, the grievant is more likely to lose the case. The following figure illustrates the three standards of review and the outcome in each instance.

Diagram of Standard of Review and Outcome of Most Arbitration Awards Dealing with Probationary Employees


The non-renewal or non-reappointment of a probationary employee
Standard: No review for reasonableness
Standard: Arbitrary and capricious
Standard: Just cause provisions apply to grievant
Outcome: Grievant usually loses case
Outcome: Grievant frequently loses the case
Outcome: Grievant frequently wins the case

Numerous examples exist in which the general reasonableness standard of review for arbitrariness was used, and the grievant lost the case. For example, a probationary counselor was not rehired by a school board. The arbitrator upheld the decision, and noted no just cause was needed to refuse to rehire a probationary teacher. The decision satisfied the reasonableness test as it was not arbitrary, capricious, or discriminatory. The board had shown the employee's poor working relationship with faculty members, her inability to perform certain administrative assignments, and her ineffectiveness in making presentations to large student groups.[65]

In another case, a district did not violate the contract by non-renewing a teacher's contract. The employee had had a series of evaluations of her effectiveness and was afforded essential fairness in making the decision not to rehire her.[66] Another award found a board's actions reasonable when it did not renew grievant's contract. The board had acted reasonably in filling existing openings in the district.[67] Lastly, an arbitrator applied the reasonableness standard of review to the non-renewal of a non-tenured teacher, and found the employer's actions reasonable. He noted that the reasons stated for the non-renewal justified the action. The grievant had failed to "demonstrate a balanced, mature judgment in day to day relationships with students, parents, and colleagues" and had failed to comply with rules and expectations of the department chair. The grievant had also been given notice of his failings and advice for how to overcome the failings, but he had done nothing about remedying them.[68]

A few examples were found in which an arbitrator refused to apply any form of reasonableness to the non-renewal of a probationary employee. A part-time teacher had worked for three and a half years at a community college. She was sent a non-reappointment notice in mid-school year (December 1974). The arbitrator ruled that she was appointed on a semester by semester basis and had no tenure in the position, therefore, she was not entitled to timely advance notice of non-reappointment. These rights were given by the contract to "faculty," which the arbitrator interpreted as meaning full-time faculty.[69]

In some of the cases reviewed, the just cause provision of the contract was extended to cover probationary employees by either clear and unequivocal language in the contract or by arbitrators construing ambiguous contract language to permit such coverage. In one such example, a teacher was sent a non-renewal notice at the end of the first year of employment with the district. The parties agreed during arbitration that the following contract clause should apply to the probationary teacher: "No teacher shall have his employment discontinued...except for proper cause." The arbitrator found the district had not satisfied this clause in the non-renewal of the grievant.[70]

Another award involved a similar contract clause providing "No teacher shall be dismissed...not reappointed, or deprived of any professional advantage without good cause." The clause was construed as applying to a probationary teacher. The board did not have "good cause" when it refused to renew her contract and was required to give her an opportunity to demonstrate her ability in some objective manner.[71]

Some contracts expressly grant probationary teachers procedural safeguards. Such "due process" type provisions were construed by an arbitrator as guaranteeing a probationary teacher the right to clearly articulated reasons for non-renewal. The arbitrator found the district's actions improper because its reasons for non-renewal were too vague.[72]

Consequently, when the arbitrator construes a just cause provision as covering probationary teachers the chances for winning the case increases for the probationary employee. An arbitrator articulated the point in this manner:

> Though the Board might legally have dispensed with the service of teachers on limited contracts without explanation or rational justification, it saw fit solemnly to undertake in a "labor" contract to assure such teachers that they would not lose job security without "just cause" and it expressly indicated that such "just cause" would be failure on the part of the teacher to correct "documented deficiencies of the teacher in the classroom."[73]

A probationary teacher may have no "right" to reappointment to another year. However, while probationary employees hold a valid one year contract, they have certain rights and protections. Discharge of the probationary teacher during the life of a yearly contract may well invoke the just cause provision even though a non-renewal at the end of the contract year may not.

Awards

Back Pay: Several awards granted back pay[74] to the grievant. In some of the awards the amount recoverable as back pay was limited by the grievant's willingness to mitigate damages during the period of unemployment.[75] For example, an arbitrator refused to award back pay to a substitute teacher because she did not make a good faith effort to find another job.[76] In another award, an employee, dismissed for poor work, was reinstated without back pay because the grievant did not actively look for work during the time off.[77] Pay has been granted for time spent doing additional tasks for an employer.[78] And lump sum payments have been given for making an improper evaluation of an employer's performance.[79]

Information in Personnel Files: A series of awards required the district to remove incorrect and inaccurate information from the files.[80] In one such award[81] the association was given the right, along with the district, to review the file and remove the prejudicial information. Another award did not require the removal of the evaluation, as it had some value, but required the district to attach a disclaimer to each file indicating the possibility of error.[82] And in one award the arbitrator changed a rating in the evaluation from "improvement necessary" to "satisfactory."[83] Other awards have granted the employee the right to see information contained in the files.[84]

Reinstatement: Several awards called for the reinstatement of the grievant.[85] A few of these awards placed certain conditions on the reinstatement. For example, an employee was reinstated provided she did not do union business at work and if she showed no improvement in this area she could be dismissed.[86]

A number of awards reinstated the grievant to an additional probationary year after the probationary period had ended.[87] For example, a teacher's contract was not renewed after the third year and last year of probation. The arbitrator ruled that the evaluation procedures were inappropriate for determining whether tenure should have been granted. He reinstated the grievant for an additional year of probation so that the employee could be properly evaluated for tenure.[88] In only one award reviewed was a grievant awarded tenure by an arbitrator.[89] Other awards required the district to give a one year contract to the grievant.[90]

In a few cases the arbitrator refused to reinstate the grievant as it was beyond the arbitrator's authority.[91] Another group of awards would require the reinstatement of grievants, but required the district to give them an opportunity for another job in the district.[92] For example, a grievant received no back pay or damages for the non-renewal of her job as a counselor but if a position became available in the district and she qualified, she was to be appointed to the position.[93]

Rectify the Evaluation: Several awards required the parties to redo an improper evaluation.[94] Some awards required committees to reconvene to redetermine whether tenure should be granted.[95] And some arbitrators required districts to provide grievants with the reasons for their termination.[96]

Declaratory Awards: In a few cases, the arbitrator did little more than sustain the grievant's claim. For example, a substitute was terminated mid-year. The arbitrator sustained the grievance but would not reinstate the grievant to a probationary period of appointment as requested by the Association.[97] In another award, involving the non-renewal of a teacher, the arbitrator "strongly urged" the board to offer the grievant a new contract as a math teacher for the 1977-78 school year.[98]

Conclusions

The arbitrators have identified numerous rights and responsibilities for employers and employees. An employer cannot abolish a position or a program simply to get rid of an unwanted employee. If the contract does not require the employee to perform particular tasks then the employee may not be evaluated on them when they are voluntarily undertaken. An evaluator's conclusions found in a final evaluation must be based on the full period for evaluation and may not, on the one hand, ignore improvements made in the last few months, or, on the other hand, focus only on the last few months of bad performance. Furthermore, an employee's immutable personality traits, such as being "crabby," known to the employer at the time of hiring may not later be grounds to support employment actions taken against the employee. And lastly, employers may have the right to automatically terminate employees without providing just cause when they fail to fulfill a condition agreed to when the job was undertaken, such as the completion of a Ph.D. prior to receiving tenure.

Once a grievance has been formalized and presented before an arbitrator in arbitration some practical realities, faced by representatives of the parties, are evident in the arbitration awards reviewed. The standard of review in evaluation cases may directly affect the outcome of an evaluation dispute. A review to insure non-arbitrary, non-capricious, and non-discriminatory actions on the part of the employer is routinely done and often supportive of the employer's action. A review to determine if the just cause provisions have been satisfied by the employer is a more difficult burden for the employer to meet. This review looks not for any reasonable basis to support the employer's action, but looks for the provision of certain enumerated rights to an employee.

Consequently, representatives for the grievant frequently attempt to extend the just cause provisions to employment decisions other than the traditional disciplinary decisions of discharge and dismissal.

To prevent going to arbitration, those who draft the collective bargaining agreement should carefully discuss the persons covered by the just cause provisions of the contract. Supplemental contracts for extra-duty assignments should also specify whether their termination, with respect to a particular employee, entitles that employee to just cause for their removal.

Some general trends were apparent in the arbitrators' awards. Generally, arbitrators will not change the substantive evaluation or rating given an employee. When arbitrators are faced with improper evaluations, they will strike the defective rating or information from the grievant's personnel file or require the employer to attach a disclaimer to the file notifying readers that the evaluation is inaccurate in some respect. However, a minority of arbitrators have made substantive changes in evaluation ratings and feel arbitration is the proper forum for re-weighing an employee's evaluation.

Arbitrators are frequently faced with alleged improper evaluations in the final probationary year when the granting of another contract to the employee would give the employee tenure. Arbitrators are reluctant to grant tenure to such employees, but instead grant an additional probationary year to the employee in which to properly evaluate the employee. Other arbitrators refuse to alter the decision of personnel committees, determining tenure, but require the committee to reconvene and reconsider their decision.

Footnotes

1. 88 AIS 14.
2. 114 AIS 1.
3. 114 AIS 1.
4. 104 AIS 9.
5. E.g., 73 AIS 4.
6. *Ibid*.
7. 70 AIS 17.
8. 77 AIS 15.
9. 79 AIS 18.
10. E.g., 105 AIS 9.
11. E.g., 105 AIS 7, 94 AIS 21.
12. See 96 AIS 7, which involved the termination of an employee after fourteen years of service.
13. E.g., 75 AIS 2.
14. 80 AIS 7.
15. 81 AIS 14.
16. 73 AIS 22.
17. 74 AIS 20.
18. 103 AIS 24.
19. 111 AIS 11.
20. 70 AIS 11.
21. 89 AIS 17.
22. 86 AIS 2.
23. 69 AIS 11.
24. 94 AIS 20.
25. 92 AIS 2.
26. 91 AIS 24.
27. 73 AIS 4.

28. 72 AIS 3.

29. 98 AIS 20.

30. 72 AIS 14.

31. 69 AIS 17.

32. 85 AIS 18.

33. 74 AIS 22.

34. 84 AIS 7.

35. 92 AIS 13.

36. 98 AIS 19.

37. 81 AIS 14.

38. 93 AIS 8.

39. 82 AIS 12.

40. 64 AIS 4.

41. 45 AIS-D 14.

42. 98 AIS 18.

43. 98 AIS 18.

44. 71 AIS 9.

45. 60 AIS 11.

46. 95 AIS 9.

47. 62 AIS 20.

48. 92 AIS 2.

49. 85 AIS 8, 70 AIS 18.

50. 77 AIS 8, 102 AIS 2.

51. 81 AIS 14, 73 AIS 22.

52. 99 AIS 12.

53. 82 AIS 8, 106 AIS 24, 101 AIS 13.

54. 104 AIS 10.

55. 90 AIS 3.

56. 98 AIS 12.

57. 105 AIS 12.

58. 101 AIS 11.

59. 100 AIS 12.

60. 70 AIS 17.

61. 77 AIS 15.

62. 100 AIS 4.

63. See also 80 AIS 7. But see 93 AIS 8.

64. 92 AIS 13.

65. 94 AIS 8.

66. 74 AIS 22.

67. 72 AIS 18.

68. 100 AIS 4.

69. 73 AIS 6.

70. 85 AIS 18.

71. 70 AIS 19.

72. 85 AIS 8.

73. 112 AIS 18.

74. 102 AIS 17, 98 AIS 4, 73 AIS 4, 111 AIS 1, 81 AIS 14, 107 AIS 16, 101 AIS 13, 100 AIS 9, 99 AIS 1, 93 AIS 6, 85 AIS 18, 85 AIS 8, 82 AIS 15, 77 AIS 15, 72 AIS 3 (in which severance pay was awarded).

75. 106 AIS 23, 102 AIS 11, 98 AIS 4.

76. 106 AIS 23.

77. 98 AIS 4.

78. 104 AIS 20.

79. 65 AIS 3.

80. 102 AIS 11, 101 AIS 11, 92 AIS 2, 82 AIS 9, 71 AIS 9, 99 AIS 12, 101 AIS 13, 114 AIS 6, 106 AIS 24, 104 AIS 9, 93 AIS 6, 72 AIS 3, 92 AIS 4, 91 AIS 24.

81. 93 AIS 6.

82. 104 AIS 10.

83. 105 AIS 12.

84. 81 AIS 14, 82 AIS 18, 73 AIS 22.

85. 102 AIS 17, 96 AIS 7, 64 AIS 4, 73 AIS 4, 81 AIS 14, 81 AIS 17, 100 AIS 9, 102 AIS 11, 107 AIS 8, 90 AIS 13, 85 AIS 8, 82 AIS 15, 62 AIS 20, 70 AIS 17.

86. 98 AIS 4.

87. 69 AIS 17, 104 AIS 7, 105 AIS 7, 98 AIS 18, 98 AIS 15, 87 AIS 24, 66 AIS 3, 107 AIS 16, 102 AIS 2, 93 AIS 6, 74 AIS 3.

88. 104 AIS 7.

89. 92 AIS 10.

90. 85 AIS 18, 70 AIS 20.

91. 106 AIS 24, 99 AIS 1, 72 AIS 3, 94 AIS 13.

92. 107 AIS 8, 88 AIS 14, 77 AIS 8, 94 AIS 13.

93. 77 AIS 8.

94. 83 AIS 7, 70 AIS 19, 90 AIS 13, 89 AIS 23, 87 AIS 17, 66 AIS 6.

95. 92 AIS 9, 82 AIS 21.

96. 91 AIS 13, 79 AIS 19.

97. 94 AIS 21.

98. 93 AIS 8.

SCHOOL ARBITRATION: WHAT THE ARBITRATORS ARE DOING

Chapter 7 - Discipline

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Introduction

Discipline cases involved approximately 7 percent of the cases considered. The vast majority of grievants are individuals, with only about one-fifth of the cases involving a class or group (i.e., two or more grievants). The discipline case is three to four times more likely to involve a male individual grievant than a female individual grievant. This is the greatest male-female disparity noted in any of the issues considered. The disciplinary actions range from oral reprimands to suspension or discharge. The acts giving rise to the disciplinary action range from alleged absenteeism to alleged physical abuse of students.

The relatively small number of discipline cases in the cases studied is itself noteworthy. In the private sector, it has been stated that discipline and discharge cases constitute 50 percent of the grievances.[1] The _Arbitration in the Schools_ series indicates that it is far less frequent for the issue to get to arbitration than in the private sector. In addition, the teacher workforce is predominantly female. Despite the predominant numbers, the vast majority of teacher disputes over discipline that reach arbitration involve men.

Discipline is one of the more traditional areas of private sector arbitration with a strong body of precedent in the private sector. Arbitrators may determine whether the allegations are accurate as well as determine whether the facts warrant the severity of the punishment imposed. Arbitrators will rely upon well-developed notions of progressive discipline, "due process," and just cause procedures as defined in arbitration precedent.

As suggested elsewhere, discipline and evaluation may be somewhat related topics. Both may use a reasonableness test, or use just cause provisions, or use the doctrine of progressive discipline. Evaluation cases far outnumber discipline cases, and the major discussion of the common elements is found in the evaluation section.

Discipline will be reviewed here from three perspectives. First, the cases will be examined for their view of what constitutes a disciplinary action and its purpose. Second, the cases will be reviewed for the evidentiary basis used for the imposition of discipline, including such matters as burden of proof. Finally, the range of awards in this area will be reviewed.

Limited Management Right: The right to discipline is a management right subject to any limitations found in the contract. In addition, it may be reviewed by the arbitrator on a reasonableness basis.

> In absence of such prohibition the right to reprimand is surely a right resting in the employer. But such inherent right cannot be utilized in an arbitrary, capricious or discriminatory fashion.[2]

Role of the Contract: The contract is likely to be subject to strict scrutiny.

> Policies, like laws, which provide for penalties must be explicit and unambiguous. To consider the policies before us as providing for such a penalty would require stretching the language to say something which on its face it clearly does not do.[3]

The arbitrator may make reference to external law.[4] However, the arbitrator may refuse to rule on claims of infringement of constitutional rights (such as free speech) and leave them to a court for determination.[5]

A relatively new development in the discipline process is the contract provision permitting union representation at the investigatory conference.[6] The limits of the right are usually spelled out in the contract.[7] It is common to permit the teacher to be accompanied by a union representative at a conference which may result in some form of discipline. The teacher can waive the right, but the waiver may have to be done in a knowing manner.[8] The right is usually limited to meetings involving disciplinary matters.[9] An employer cannot generally refuse to meet in the presence of a union representative because the employer dislikes the particular union representative being used.[10]

A variety of procedural issues surround the conduct of any disciplinary proceeding.[11] One such issue may relate to giving the teacher a fair opportunity to prepare and present a defense. Another procedural issue concerns the type of information or evidence that the school may use to prove its contentions.

Purpose and Context

Progressive Discipline: An analogy commonly used in the discipline area is to equate employment discipline processes with the processes of the criminal law. As already indicated, the arbitrator may strictly construe the contract (narrow its scope[12]) in the way that a court might strictly construe a criminal statute. Another common approach is to view the imposition of discipline in terms of "good industrial relations." One arbitrator stated this common approach as follows:

> Good industrial relations practice requires a system of progressive discipline which may involve (1) an oral warning, (2) a written warning, (3) a suspension, and (4) discharge.[13]

The idea of progressive discipline involves moving from the less severe to the more severe punishment. The rationale behind progressive discipline is stated by another arbitrator as the following:

> In this age of progressive discipline, warnings and corrective disciplinary measures generally serve a constructive purpose. The employee is thereby appraised that his work performance is inadequate. He is placed on notive that unless he substantially improves in performance of his duties, he may be subjected to termination. The Board would have written documentation of the incident. The party issued the warnings would have immediate knowledge of the offense and the opportunity to refute same, if considered to be unjust.[14]

The idea of progressive discipline and its rationale should be borne carefully in mind. It may be predictive of the results in a number of arbitration cases. For example, failure to proceed from the less severe to the more severe forms of discipline may result in the overturning of some discharge penalties.[15] Discipline, from this perspective, is seen as a helping process at these earlier steps. Where there has been serious misconduct, but action not warranting discharge, the employer need not, of course, begin with the minimal punishment. However, progressive discipline beginning with the more serious penalty might be warranted prior to discharge.[16]

Just Cause: Another important element in the discipline context is the common contractual requirement of "just cause." One arbitrator defined it in this manner:

> The purpose of the "just cause" provision is to guarantee to the grieved employee that he or she will have full opportunity to learn all the details of the charges, and to confront and examine those who have testified against him or her. It is *not* the purpose of a "just cause" provision to prevent an employer from discharging an employee who has caused serious difficulties in the operation of his business, or materially harmed his relationship with his customers or others with whom he has business relations.[17]

Just cause may be an element in the evaluation grievance. A common issue in those evaluation grievances is whether the just cause clause applies to the evaluation of the employee. That is rarely an issue in discipline cases. The traditional role of the just cause clause has been its common application to the discipline case. Arbitrators clearly indicate that the industrial sector analogy will be used in the public sector education cases for discipline cases. The just cause provision is commonly included in the contract. An arbitrator, however, might be willing to imply one even if it was not explicitly included.

> It is the Arbitrator's view that, even without a "just cause" clause, the existence of a collective bargaining agreement provides the protection of "just cause" principles in discharge cases....One of the primary purposes of collective bargaining is to establish fair procedures in management employee relations. Employees are protected against arbitrary and discriminatory exercise of managerial authority.[18]

Reprisal: Discipline may serve many functions. However, one purpose which is not permitted is to allow the employer to use discipline as a reprisal action after an employee has taken a lawful, but annoying, action. Reprisal is not an uncommon charge by an employee.[19] It is a charge that is very difficult to prove.

> More than suspicion must be adduced before a finding of reprisal can be made. Reprisal is a serious charge to make against an employer inasmuch as it alleges a violation of law as well as of contract. Substantial evidence to support such a charge must be shown before reprisal can be found...the proof should be such that, after a reasonable consideration of the evidence and circumstances, impartial person would believe upon the basis of the preponderance of the evidence that a reprisal did occur.[20]

Unions which seek to grieve such a charge may be required to have an unusually well-prepared case. The burden of proof clearly lies with the union.

What is Disciplinary: When discipline occurs, it may be subjected to vigorous review by the arbitrator under a just cause or reasonableness provision. However, not every situation, in which a teacher feels disadvantaged, will be considered a disciplinary situation. One arbitrator stated the following:

> While discipline can frequently be identified by the presence of a penalty, the direct imposition of some form of sanction is not a prerequisite to the exercise of disciplinary action. In its broadest sense, discipline involves any form of instruction designed to influence an individual to conform his or her conduct to a certain desired course of action.[21]

Arbitrators may consider an action to be disciplinary even though it may have been unintended as punishment.

> The question is whether a teacher who speaks freely at a departmental meeting should be vulnerable to a class reassignment because he has annoyed his colleagues. If the teacher has committed a disciplinable offense, charges should be brought and a full hearing held. The class reassignment was not intended as punishment but it had that effect.[22]

In another situation, a teacher was warned by letter about absenteeism. The question arose as to whether discipline was involved. The arbitrator said:

> The letter...suggests doubt of Grievant's capacity to continue, as such it has more of the characteristics of a reprimand than counseling.[23]

After a review of all the facts, the arbitrator's award was that the letter should be removed from the teacher's file.

On the other hand, not every communication between the school and the teacher is a disciplinary action. Where a notice was sent to teachers requiring them to wear ties, the arbitrator found that the notice did not constitute discipline at that point.

> The arbitrator simply cannot anticipate what the employer might or might not say in the (future) evaluations...It is absolutely impossible for the arbitrator to judge the employees' evaluations because these evaluations were not completed at the time of the arbitration hearing in this matter.[24]

The arbitrator appeared to rely upon the common rule that awards will not be based upon future events when the facts are not known. Similarly, where the grievant is called to the office by the principal and read a memo on signing-in procedures, the arbitrator found that it was not a disciplinary event.[25] Another arbitrator found that placing a letter in grievant's file, which stated accurately the fact of a later arrival, a cancelled class, and the dialogue between the teacher and the principal, did not constitute discipline. The arbitrator specifically noted that the arbitrator was not determining the evidentiary value of the letter in the event of a just cause proceeding.[26]

Where discipline is involved, the school district may be given a special burden of proof which requires establishing a high standard of proper procedures. This shift in approach makes it particularly important to determine when discipline is or is not involved.

Evidence

Introduction: In order to discipline an employee under an explicit just cause provision, the employer must present a convincing case. The case should consist of several elements: (1) evidence of a clear rule of conduct that was known to the employee; (2) evidence of an adequate factual investigation; and (3) sufficient credible evidence to meet the burden of proof in the case; and (4) a penalty that fits the misconduct.

Rules of Conduct: One of the most critical elements in the discipline cases reviewed was the need to demonstrate that the teacher violated a rule that had been properly promulgated and was known by the teacher. A teacher must have actual or constructive knowledge that the teacher runs a risk of discipline by engaging in certain conduct. Knowledge or constructive knowledge may come from several sources: (1) a directive promulgated by the school and given to the teacher; (2) provisions in the contract; (3) posted procedures which indicate the consequences of disobedience; or (4) past practices of the employer school consistently applied.[27]

One frequent ground for disciplining teachers is for failing to attend various mandatory meetings, such as a parents meeting or a PTA sponsored event.[28] In one such case, the discipline was found to be improperly imposed when no explicit rule required attendance, although an "expectation" of attendance had been announced, and although there was a past practice of attendance being voluntary.[29] In another situation, a school district officially claimed a mandatory rule existed on extracurricular assignments, while at the bargaining table the district claimed that the assignments were voluntary. The apparent inconsistency led the arbitrator to find no mandatory rule had been promulgated.[30] On the other hand, where an attendance rule clearly existed but was violated by the teachers for fear of incurring legal liability, the arbitrator ruled that under the "work now--grieve later" analysis, discipline was properly used.[31]

Where a rule of conduct exists, it can serve as the basis for discipline only if it is consistently applied. Where rigid application of a rule has not been followed in the past, the school district may not be permitted to suddenly begin rigid enforcement without advance notice.[32] Past practices become extremely important in these cases. If the school can show instances of prior application of the rule, the employer may have a winning case.[33] Where a rule exists, and it is known and consistently applied, there is some suggestion that a violation by the teacher may be tolerated in an emergency situation.[34] It seems likely than an emergency would be difficult to prove and the burden of proof would lie on the grievant.

Where a teacher is charged with the violation of a particular rule of conduct, the arbitrator may be reluctant to permit the school to switch to another rule as the basis of the discipline. Thus, when a teacher is charged with a particular violation, it must be prepared to prove the charge as made and will not be permitted to show that some other rule may have been violated.

> Retrospective reconstruction of rationale to sustain discipline that might never have been imposed on an originally accurate perception of the circumstances cannot be squared with fairness.[35]

Investigation: An adequate investigation is a prerequisite to properly imposed discipline.[36] The alleged facts must be demonstrated as true before the arbitrator will sustain the disciplinary action. In a case where a "misquotation" of a school board member was published in a union newspaper, the board could not discipline the teacher-union president just because they were unable to find who actually wrote the material.[37]

> The right to include derogatory information in a teacher's file...must be read to mean that the material must be true and must pertain to the teacher affected. Otherwise employees would have no protection against totally unfounded inclusion of materials which could adversely affect their professional lives.[38]

Proof: Enough evidence must be shown to prove the misconduct.[39] The evidence must come from credible sources.[40] The amount of evidence needed may vary with the penalty. Discharge cases will require the most substantial proof.

> The arbitrator...could not sustain the discharge...if there existed any reasonable doubt in the arbitrator's mind concerning the guilt of either of the two grievants. To that end...the college...must in fact make a prima facie case of the misconduct of each of these two grievants.[41]

Some other types of charges, such as the use of excessive force on a student, may also be situations requiring high degrees of proof by school authorities.

> The Arbitrator is cognizant that discipline based upon the moral turpitude of an employee is of a more serious character than other basis for discipline....Hence, the Arbitrator adopts a stronger standard of proof than in other cases as necessary for the Board to establish its case herein, but less than the standard of beyond a reasonable doubt.[42]

Off-Duty: An uncommon, but very difficult situation is faced by a school district when an employee is charged with a crime that has taken place outside of the employee's normal working hours. The school may wish to discharge or suspend the grievant prior to the trial, in effect, for matters that are unrelated to their normal working duties. The question becomes whether "just cause" exists in these cases. A common defense used by grievants in these cases is that the employer should not be permitted to consider matters outside of the employment relationship. In addition, there is the traditional presumption of innocence. Finally, where conduct outside working hours could adversely affect the school's reputation or impact on job responsibilities, a suspension or discharge may be upheld.[43]

Miscellaneous: Discipline is commonly based upon a single event. In some cases, however, it may result from an accumulation of minor incidents, no one of which is very serious. A "series of minor violations accumulating from day to day" may form an adequate basis for disciplinary actions where warnings had been given.[44] Suspicion will not take the place of facts. A teacher could not be disciplined for taking Monday or Friday leave days where each day had been individually approved and the number taken was within the contract limits.[45]

Awards

Misconduct can result in a variety of disciplinary actions. Discipline may consist of the following, or some combination thereof: (1) on oral reprimand;[46] (2) a letter of reprimand in the personnel file; (3) a suspension without pay; or (4) a discharge. Where the discipline has been improperly imposed, the award must attempt to undo the punishment, or return to the status quo.

A letter of reprimand placed in the personnel file is a common form of discipline. Where it is found to be improperly imposed, the common remedy is an order to remove the letter.[47] One variation on this theme was an award which stated that the letter should remain in the file until a fixed date in the future. If at that time there had been no further repetition of the misconduct, then the letter should be removed.[48] In some situations, the arbitrator may state that the award should be included in the winning grievant's file.[49] In unique awards, the arbitrator may include a statement praising the grievant when the discipline was particularly unwarranted.[50] Where a grievant has been improperly suspended or discharged, reinstatement and backpay may be given.[51]

In some cases, the arbitrator may find that some degree of punishment is warranted, but that the degree used by the school district was unwarranted in its severity. Accordingly, the arbitrator may reduce the punishment. A three month suspension may be reduced to a letter of reprimand.[52] A discharge may be reduced to a short suspension,[53] or a suspension and letter of reprimand.[54]

Acceptable grounds for the mitigation of deserved punishments vary. Discharge for abuse of sick leave may be mitigated because of the school district's past practice of being liberal in the leave area.[55] Where personnel rules are violated, evidence of inconsistency in enforcement might be used to mitigate the discipline. Another ground for mitigation may be the grievant's own good record up to that point.[56] Failure to use the earlier, less severe steps of progressive discipline may lead to mitigation.[57] Where a teacher and supervisor engaged in a shouting match, the conduct of the supervisor might be seen as a mitigating factor in reviewing the discipline imposed upon the teacher.[58]

Going further than simply reducing a punishment due to mitigating factors, the arbitrator may find that no punishment at all is warranted. This would clearly be the case where there is no factual support for the allegations. It may also be true in other cases, as illustrated by the following statements.

> [The teacher's] failure to comply with the Memorandum [on preparing grades by a certain date] was fully justified....[The teacher] did not...act in an imprudent, unreasonable or unprofessional manner....[59]
>
> It is clear that if someone willfully violated the rule or negligently violated the rule, then that teacher should suffer the penalty. However, if it can be shown that it was extremely difficult, if not impossible, to comply with the rule, then the rule should not be applied to bring about harsh and unjust results.[60]

Thus there may be situations in which a rule was violated, but in which an arbitrator found that the teacher's actions were reasonable and should not be punished.

Discipline cases involve at least two issues. One is whether the grievant is guilty of the misconduct as charged. The second is whether the grievant, having been found guilty, deserved the level of punishment used. The grievant thus has two different arguments to make in a discipline case. Each argument requires its own careful preparation and presentation.

Footnotes

1. A. Zack and R. Bloch, The Arbitration of Discipline Cases, Preface at V (1979).
2. 87 AIS 25.
3. 68 AIS 15.
4. 73 AIS 23.
5. 111 AIS 23.
6. 115 AIS 11.
7. 94 AIS 22.
8. 115 AIS 11.
9. 114 AIS 12.
10. 96 AIS 2.
11. E.g., 58 AIS 0-8.
12. 68 AIS 15.
13. 46 AIS AD-5.
14. 96 AIS 7.
15. 70 AIS 11; 46 AIS AD-5.
16. 96 AIS 7.
17. 68 AIS 16.
18. 68 AIS 16. See also 72 AIS 13.
19. 54 AIS TW-8.
20. 54 AIS W-16. See also 52 AIS 13.
21. 62 AIS 2.
22. 54 AIS TW-8.
23. 66 AIS 7. See also 101 AIS 15; 62 AIS 7.

24. 66 AIS 5.

25. 82 AIS 4.

26. 89 AIS 3.

27. 116 AIS 10; 72 AIS 13.

28. 56 AIS DK-7.

29. 105 AIS 10.

30. 74 AIS 8.

31. 104 AIS 5.

32. 55 AIS D-6.

33. 94 AIS 10.

34. 105 AIS 16.

35. 62 AIS 8.

36. 115 AIS 11.

37. 87 AIS 25.

38. 87 AIS 25.

39. 104 AIS 13.

40. 89 AIS 5.

41. 64 AIS 4.

42. 89 AIS 5.

43. 96 AIS 3; 74 AIS 13.

44. 106 AIS 21.

45. 68 AIS 11.

46. 73 AIS 23.

47. 96 AIS 2; 87 AIS 25; 74 AIS 15; 74 AIS 8; 56 AIS DK-7.

48. 97 AIS 15.

49. 115 AIS 11.

50. 111 AIS 11.

51. 115 AIS 11.

52. 115 AIS 13.

53. 71 AIS 22.

54. 75 AIS 10.

55. 75 AIS 10.

56. 113 AIS 8; 72 AIS 17.

57. 113 AIS 8.

58. 55 AIS D-6.

59. 110 AIS 9.

60. 101 AIS 15.

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Introduction

Nature of the Grievance: Extra duty grievances share the top position with leave issues as being one of the two most likely issues to be grieved. Approximately one-fifth of the cases in the study were extra duty grievances. While leave and extra duty grievances are similar in terms of overall numbers grievances raised, they differ greatly in at least one aspect. Most leave issues involved an individual grievant, while seventy-five percent of the extra duty grievances involved a group or class of two or more grievants. The number of individuals filing extra duty grievances was relatively small. It is difficult to meaningfully distinguish between the number of extra duty grievances filed by male teachers and those filed by female teachers, although slightly more were filed by male teachers. The big difference was between the number of individual and group grievances. Leave requests are likely to reflect individual circumstances. Extra duty orders, however, are likely to affect the workforce at large.

Where grievances involve large numbers of individuals, the arbitrator's decision is likely to have a greater impact on managerial rights. A leave issue involving one person that is decided in favor of the individual may give greater consideration to the general equities of the situation without being viewed as a major inroad on management's rights. However, a group dispute over a work order might be viewed by management as a more significant matter. One might expect to find that the arbitrator will put more emphasis on the particular language of the contract in the cases affecting groups of teachers.

The specific types of grievances vary greatly. For these purposes, a three-fold overall breakdown has been chosen: (1) extra duty-school day;

(2) extra duty-beyond school day; and (3) class size. In the first category of extra duty-school day, a variety of different situations are raised by the grievants including changes in the calendar, the school day, and the class period; use of preparation periods; duties during other non-class time; administrative and paper work requirements; and the treatment of non-teachers (usually librarians and counselors) compared to teachers ad defined in the contract. In the second category, problems arise concerning traditional extracurricular activities such as athletics and plays; problems concerning after-school meetings; and loss of unit work to non-unit persons. In the third category, class size, one of the major categories of grievances relates to agreements to attempt to maintain current or reduce class size.

Reasonableness v. the "More" Reasonable: The school district has the primary role in determining what duties will be performed.

> It is a long-established management right to direct the work force - to assign duties and develop job descriptions.[1]

Another arbitrator stated the matter in a similar fashion:

> The Employer bargained for an additional commitment of teacher time [but no specified length of time].... The details of how that additional period of work would be utilized would ordinarily seem to be a matter for management decision, subject to specific restraints of the collective bargaining agreement or the generalized restraints against compelling employees to do things which are injurious to health, safety, or dignity of the individual.[2]

The decisions of the school management may be subject to scrutiny under a reasonableness standard. One rule for the application of the reasonableness test may come into play in the context of extra duties. There are frequently alternative ways of achieving a goal, such as setting employee work schedules. The school may select one way and order the teachers to perform their duties accordingly. The teachers may feel that there is a better alternative. For purposes of grievance determinations, the arbitrator is likely to consider only whether the school's proposal was reasonable. The fact that the union might show an equally reasonable alternative, or, perhaps, a "more" reasonable alternative is not likely to convince the arbitrator that the school's decision was unreasonable. As one arbitrator stated:

> Unless there is persuasive proof that the decisions that were made were arbitrary or capricious, the fact that other methods of operation could have been adopted does not prove that any contract violation occurred.[3]

The general rule will necessitate showing a decision is unreasonable, not that there is a "more" reasonable alternative.

Work Now-Grieve Later: Teachers who wish to protest a decision of the school administration must follow the "work now-grieve later" rule.

> It is a cardinal rule in arbitrations that an aggrieved person cannot resort to self help. The proper procedure would be for the employee to file a grievance, and to continue to do what was alleged to be required of him or her, with the arbitrator to determine the remedy or redress should the grievance be sustained.[4]

The prohibition on self-help may apply to school employers too. A school violated the 181 day limit in the contract when it scheduled make-up days to cover the 4-hour-day slow-down that the teachers engaged in during a wage dispute.[5] The district was not permitted to unilaterally fashion its own remedy to "cure" the teachers' improper action where the remedy would violate the contract.

School Day Duties

Introduction: Contract language is a critical element in the extra duty grievance. Words may be used that appear clear, such as "instructional time," but which become unclear in unanticipated circumstances. Extra duty grievances have at least two distinct facets. In one type of grievance, the group is seeking to protect itself from the imposition of added duties without a commensurate increase in salary. For this type of protection, the contract may contain language which sets "maximum" limits on the day or year. In another type of grievance, the group may be seeking protection from a reduction in their duties, which will also mean a reduction in their total income. For this type of protection, the contract may contain language which sets "minimum" limits on the day or year. Problems begin to arise for example, when a contract speaks in the limiting language of "minimums," and the school seeks to extend the school year or day. Similar types of language problems arise when the contract speaks only of "teachers," and a counselor grieves an extra duty order. Much of the focus in these grievances will be upon the contract language which must be applied in a new or different than usual context.

Minimum and Maximum Year: A number of grievances deal with changes in the length of the teaching year. Contracts may state the number of teaching days included in the school year. In addition to a minimum number of days, provisions may be made for expendable "snow days" which are school days missed due to bad weather. A problem can arise at the end of the year when there are unused "snow days," but no maximum number of teaching days stated in the contract. The district may add the unused "snow days" to the calendar. In one such case, the arbitrator ruled that, based on past practices, the unused "snow days" could be used as additional, instruction days.[6] The failure of the school district to not schedule the unused "snow days" in the past, however, was not construed as a binding past practice where, as here, the district elects to schedule them for the future.[7] The failure to exercise discretion in determining the school calendar in the past is likely to be distinguished from having always exercised discretion in a certain direction. The failure to exercise discretion is not a past practice. However, the exercise of discretion in a consistent direction may create a past practice.

Where weather creates problems, the school district will frequently have to juggle the calendar to make up lost days. The new schedule is not likely to please everyone. Under a reasonableness test, where the school district does reschedule to make up for snow days, a reasonable schedule by the school district will not be likely to be overturned by the arbitrator because the teacher's union advocates what it considers to be a more reasonable alternative schedule.[8] The proposed schedule by the district must be demonstrated to be unsound. A schedule will be either intrinsically sound or unsound. Demonstrating all potential alternatives is not likely to be helpful in showing unsoundness.

Grievances involving the school calendar face the obvious problem that the school year will be over before most arbitration awards can be made. The school district may argue that because of this fact, the arbitrator should dismiss the grievance. The arbitrator is not likely to agree. However, the arbitrator's award, if any, is likely to be something like monetary or a statement of rights, and not a reopening of the school.[9]

The contract may provide for "consultation" between the school and the union on the new schedule. Such an agreement is binding[10] despite the obvious managerial right in scheduling the work force in the absence of a limitation.

The consultation is likely to require more than merely notifying the other party of the new calendar.

Related to the teaching-year-for-teachers issue, is the issue of the teaching-year-for-non-teachers. The contract may read in terms of a calendar for "faculty" or "teacher," and ignore the other types of professional and non-professional personnel. The question may arise as to whether counselors come within the definition of "faculty members." One arbitrator held that they did not, and, based on a past practice, required a longer working year for counselors than for teachers.[11] The parties should take care to include clear provisions in the contract not only for the teachers, but also for the other employees who may not come within the standard definition of "teacher."

Many cases involve extending the work period, but some involve shortening the work period. The grievance arises when the salary is also diminished. Where a contract provided no minimum number of months in the contract year and included no other job security provision, a school district was justified in reducing the duration of jobs from 12 months to 10 months.[12]

Teaching Day: In addition to school year issues, there are grievances over the length and number of classes per school day. There are several variations on the theme. Some involve a permanent increase in work time, such as lengthening the class "hour." Others include occasional increases, such as "covering" for an absent teacher.

An across-the-board increase in the class period from 40 minutes to 45 minutes was found to violate a "maintenance of standards" clause and a past practice.[13] The case illustrates the need to thoroughly search the contract for related clauses. As indicated, a "maintenance of standards" clause may be viewed as freezing the status quo. A "consultation" provision may obligate the school district to negotiate before imposing changes. Other types of clauses may also be relevant.

When a teacher is absent, that person's classes must be covered. They might be covered by an outside substitute teacher or covered by the use of in-house teachers during their "free" time. An important element may be whether the absence is expected to be of a shorter or longer duration. In one case, assignment of a teacher to take the additional class of a teacher who had left on maternity leave did not violate the terms of the contract.[14] The related clauses were ambiguous, and as they had been drafted by the union, they were construed against the union. On the other hand, a district did violate the contract when its failure to hire substitute teachers resulted in regular teachers covering the classes of temporarily absent teachers.[15] The school district's defense was lack of funds, but the arbitrator rejected the argument when the claim could not be demonstrated. Presumably, there was no true emergency in the situation. When the budget defense is relied upon, the school has a heavy burden to show that, in fact, there is an overall cash shortage.

Where satisfactory staffing cannot be negotiated, a fall-back position for the union is to attempt to negotiate a clause requiring the school district to use its "best efforts" to obtain additional people. Such a clause may apply where the school seeks to have teachers cover for absent colleagues. In one case, the contract stated that the school district "is obligated to exhaust every possibility available" before assigning regular teachers to cover another's class.[16] The decisions on these types of "best efforts" clauses do not point in any one direction.[17] It appears likely, however, that such a clause puts a heavy burden of proof on the school district when it seeks to show that it attempted to comply, but failed. A strong factual case may be needed when the "best efforts" fail. One arbitrator stated the following:

> The argument presented by the district that the board of education had restricted it from hiring extra staff and thus it could not hire a part-time teacher...cannot prevail. If it is allowed to stand, there is no limit to the directives the board of education can issue to abrogate the district's obligations under the collective bargaining agreement....An employer must look down the road when it agrees to a clause in a contract. After it agrees to a clause, it cannot come back later and say we can't afford to honor it.[18]

In the work-day context, as well as in the work-year context, the role of the non-teaching professionals may become a problem where the contract speaks primarily in terms of teachers. The non-teaching professionals who present the most issues for resolution are nurses, counselors, and librarians. In a case dealing with some of these groups of employees, the arbitrator read the contract word "teacher" as including them because they also held a teaching credential and often taught classes. Thus they were included in a lengthening of the work week under the contract.[19] Based on the language of the contract and past practices, opposite results may also occur. Teachers may be one contractual class of employees, and nurses, counselors, and librarians may be another.[20]

Starting Time: One frequent contractual goal of the teachers' union is to permit the teacher to have some respite from the classroom during the work day. One reason for this class relief is because teachers have many other obligations in addition to teaching which require attention during the work day. When not teaching, the school district, may want the teachers present and available whenever children are present. At these times there may be a conflict between the employer's need for student supervision and the teacher's need for time to accomplish other tasks.

Responding to these pressures, one contract set a limit on overall "instructional time." The school district later required the teachers to report 10 minutes before classes to meet the buses (i.e., not "instructional" time). The arbitrator held that the instructional time limitation did not apply and the earlier reporting time was upheld.[21]

Some contract clauses deal with starting times prior to class time by providing that reporting times will be established by "mutual consent." Under such a clause, one arbitrator held that there must be a consensual agreement.[22] Unilaterial decision making and merely notifying employees of a changed time was held to be insufficient. Another approach to the starting time before class time issue may be the installation of a time-clock punch system. One arbitrator held that the mere installation of such a device was not itself a contract violation since mere installation set no new conditions of employment.[23] A major portion of the union's case consisted of descriptions of the potential for future problems created by such a device. Following a commonly used rule, however, the arbitrator would not base an award on possible future problems until the possibility becomes a reality, if it ever does.

Added "Paperwork": School administrators may seek to impose additional, record-creation, and records maintenance requirements on teachers. In one case, requiring new methods of maintaining attendance records was found to be within the management right. The arbitrator, however, "strongly" suggested that the teachers should be consulted.[24] Another arbitrator arrived at a similar result. That arbitrator said that a change in an assignment does not automatically become a changed working condition for purposes of the contract.[25] However, where the contract provided that attendance record "calculations" were non-teaching duties, simplification of the "calculations" were non-teaching duties, simplification of the "calculations" did not mean that the contract restriction had been successfully avoided.[26] If teachers did not have to perform the "calculations" they did not have to do the simplified ones either.

Time limits for performing non-teaching duties may be included in the contract. Where the contract provided a full day for preparation of grade reports, the school could not shorten the time period to accommodate the needs of the data processor.[27] Where the contract required daily lesson plans to be used, the school could not require teachers to turn in lesson plans a week in advance.[28]

Other Non-Teaching Requirements: A number of teacher duties relate to work with students, but do not directly involve classroom teaching. Arbitration decisions in these areas turn heavily upon evidence of past practices or upon evidence indicating that such duties fall within the common and usual definition of the obligations included in teaching. Visiting students at their homes,[29] staying after school to monitor student make-up work,[30] administering a detention policy,[31] and requiring the preparation of letters of recommendation for college applications[32] may be non-compensable duties within the teachers' normal obligations under a given contract. However, a shift of advising duties from a department chair to the faculty may violate a past practice.[33]

Non-Teaching Time: The contract may provide that teachers will have only a certain number of classes during the day. This may leave some non-teaching time in the work day. Teachers may view this time as uniquely their own. Administrators may view this time as potentially "free time" during which teachers can be given other, albeit non-teaching, duties. When an assignment is made, a grievance may result. Where a contract provided for five class sections, and "no more than one other duty," the arbitrator held that the "other duty" could not include assisting another teacher in laboratory classes.[34]

It may not be realistic in all situations to absolutely limit the number of class assignments. One alternative is that after specifically limiting the number of classes a teacher may be assigned, a contract may provide that additional classes may be assigned after "conferring" with the teacher. In such a case an arbitrator held that the contract required more than merely informing the teacher of a fait accompli. Actual discussion and notification was required.[35] Another way in which the contract may provide for flexibility is to state that class assignments shall be "not reasonable" and "as assigned."[36] This type of language still leaves the school district's decision subject to scrutiny, and gives the teacher some protection. Another way in which a teacher may have non-class time is when the teacher's entire class is assigned to take, for example, a music class from a second teacher. Where the contract so provides, the first teacher may be protected from other assignments during this "free" time.[37]

A somewhat unique clause may be used in the case of union officers. It is not uncommon to find a contract providing for a reduced work load for a teacher during the term of a union office. The purpose, of course, is to accommodate the employee's to perform the union duties.[38]

Preparation Periods: Teacher preparation periods are times which teachers view as solely theirs and which administrators occasionally view as flexible times that might be used for other purposes. One of these other purposes might be a requirement that teachers attend meetings during the preparation time. Where the contract clearly makes the preparation time a time for the teacher, this intrusion may not be permitted.[39] In an emergency, however, the contract may permit other duties to be required.[40] In the absence of contractual protection, giving non-teaching assignments during the preparation period may be within the scope of management's rights.[41]

Another issue relating to "prep" periods involves librarians and other non-teaching professionals when the contract gives "prep" periods to "teaching employees." The question becomes whether other employees are entitled to preparation periods. In one case, a librarian who also taught classes was denied a preparation period given to "teaching employees."[42] The arbitrator found that the classroom activities were voluntary, and found the denial of a preparation period reasonable.

Miscellaneous: Contract provisions relating to the lunch period can also present issues for the arbitrator. Two questions may commonly be raised. One is whether lunch is a duty free period. The other is whether the teacher can leave the school premises, assuming that it is a duty free period. The first issue may be answered by the contract. One arbitrator ruled, however, that even where lunch was duty free, the clause alone did not mean teachers could leave the premises, unless it was sanctioned by a past practice permitting the leaving.[43] Whether a lunch is completely duty free may be a difficult question. Where teachers were protected by the contract from cafeteria supervision, an arbitrator ruled that the school could, nevertheless, require them to remain in the cafeteria in order to help the aides who had the direct supervision responsibility.[44] Playground and bus-loading supervision are also areas in which the contract may be written to protect the teachers from duty assignments.[45]

Administrators who are under collective bargaining agreements may be treated somewhat differently than teachers. One arbitrator described them as "supervisory personnel who customarily work irregular and additional hours without remuneration."[46] This may make the distinction between time of duty and times that are duty free more difficult to distinguish.

Beyond the School Day

Introduction: Some types of extra duties extend beyond the normal teaching day. Involvement with the school's athletic program is one of the more common examples. Extra duty questions in this context may involve at least two issues. One is whether the teacher can be compelled to perform the extra duty, with or without pay. A second issue is whether the school can deprive teachers of what is seen as a desirable (and often compensable) extra duty. After-school extra duty grievances frequently involve the second problem. The subject of transfers and reassignments is discussed in detail elsewhere, however, it is noteworthy that a common grievance in the transfer area involves the involuntarily removal from an extra duty coaching or other position.[47]

Unit Work: Extra-duty type grievances may also raise other issues. One such issue is whether a coaching position may be taken over by an administrator. The issue then becomes whether a particular duty can be taken away from a collective bargaining unit member and given to non-unit personnel. Where the contract requires that non-unit personnel cannot hold bargaining unit positions, the grievance should be sustained.[48] However, where the job may be included in the job description of an administrator, the unit may lose the position.[49] Loss of a unit position may represent a major challenge to a union. The immediate effect may be the loss of a dues paying member. The long term impact may be seen as a challenge to the very existence of the collective bargaining unit, or at least a diminution in its collective strength by a reduction in the number of members.

"Obligations" of the Position: After-school, extra-duty work may be of a voluntary or involuntary nature. Such duties may also involve issues of pay or non-pay. The switch from voluntary to involuntary status may result in a grievance. Absent a past practice permitting such a change, one arbitrator found the switch to be a contract violation.[50] On both the pay and voluntariness issue, contract language, bargaining history, and past practices will be primary aids in the grievance resolution.[51] Another important determinant may be a finding that a certain after-school activity is a normal obligation or expectation of the position. When after-school activities are found to be part of the normal obligations of a teacher, the management rights provision may permit the school to require participation.[52] After-school, extra-duty assignments may include chaperoning dances or attending a school "fair." Where contracts are silent, the arbitrator may find such activities to be within the teacher's responsibilities.[53] Another related contract provision are clauses which require attendance at a minimum number of teacher-parent functions.[54]

One arbitrator has stated:

> Traditionally, collective bargaining agreements between school districts and teachers do not contain a precise definition of all the duties which teachers are expected to perform....However, there are a number of duties which teachers are expected to perform over and beyond those spelled out in the agreement.[55]

The job description may be one place to look to help elaborate these responsibilities.[56] The definition section in the contract might be a place to attempt to define the "normal" duties of the teacher.

Strikes: After-school activities may take on a special significance in a strike situation. While a strike may lead to a cancellation of classes, other teacher activities, such as coaching a school team, may continue. In such a situation, the teacher-coach may be able to claim pay under the contract provisions for coaching when no pay for teaching can be claimed because of the strike.[57]

Meetings: Another after-school activity concerns attendance at meetings. The contract may contain language that limits meetings to the defined work day.[58] Meetings required in special circumstances and held in good faith may meet a contractual "reasonableness" requirement which limits after-school meetings.[59] Teacher-parent meetings can lead to grievances. Where the contract limits the length of the working day, parent meetings scheduled in the evening may violate the contract.[60] Where the contract is clear, past practices may or may not be germane.[61]

Non-teaching employees may also be affected by extra duty activities. Grievances may be raised, for example, by cooks. In one such case, teachers are required to work; but the cooks are not similarly called, an arbitrator permitted the cooks to grieve the loss of pay.[62] Similarly, custodians may grieve the failure to permit them to cleanup after a faculty meeting held on a day when classes were not in session.[69] Commonly, the basis of the grievance is the loss of pay resulting from the loss of a potential extra duty.

Class Size

Introduction: A correlation is often drawn between class size and the effort that a teacher must expend. Teachers may feel that their teaching effectiveness diminishes as class size increases. Accordingly, contracts often contain provisions on class size. One such clause may limit the maximum size of a class. Another type of clause may oblige the school administration to make good faith or reasonable future attempts to reduce the current size of the classes. Preliminary skirmishes may occur over whether a class size grievance becomes moot once the school year has ended. One arbitrator ruled that it did not because it had not been settled by mutual agreement.[65] This is not to say that the passage of time might not affect an award. However, it does follow the general notion that an arbitrator is reluctant to let an unresolved grievance go unanswered because of a procedural issue. This is particularly salutory approach given the usual nine-month, stop-start school year. While the grievance may not be mooted, the nature of the award may be affected.

Educational Policy: In general it might be stated that where there is no contractual limitation, the school may determine class size under its general management right.[66] Where there is a limitation on class size, the school may attempt to schedule an increased number of class meetings to avoid going over the limitation in any one class. Such a schedule may be rejected in the face of clear contract language.[67] In such a case, the school's defense of deprivation to the students if the schedule was changed was rejected by the arbitrator. Absent some exigent circumstance, "educational policy" arguments may not prevail where the contract language is clear. One arbitrator described the matter as follows:

> Because the record fails to demonstrate that the District could not have met its commitment to neighborhood schools, the undersigned concludes that there is no apparent reason related to educational policy justifying the District's decision to plan for elementary class sizes in excess of the maximum set forth in the agreement. The District also failed to demonstrate that it was not economically feasible to achieve in its planning the class size objective provided in the agreement. Lastly, it is not apparent on the record that limitations on the District's physical facilities made it impossible, or even impractical, to achieve the contractually stated objective.[68]

De Minimus: A class-size restriction in the contract may be read strictly. Class-size limitations commonly read in terms of 20 to perhaps 30 students. The school district may argue that one or two students over the specified limit should be viewed as a de minimus violation. However, that argument has been rejected by some arbitrators.[69] On the other hand, a doctrine of de minimus violations may be recognized in other areas.

Quota or Goal: The contract may establish a class-size "goal" or "guideline" rather than a quota. The school district may agree to use its best efforts to take reasonable steps to achieve the goal. Arbitrators may put a heavy burden upon the school to demonstrate why the goal was not met.[70] A defense based upon the district's choice to promote quality education (i.e., hire in other areas) rather than meet a class-size goal may not be satisfactory.[71] On the other hand, contract language, which limits class size, may be read more leniently as a long-range goal rather than a rigid standard.[72] Where a teacher was over-loaded, but the district had restructured her schedule and provided an aide, the arbitrator may find that a reasonable effort was made.[73]

Bargaining history will be an important aid in determining whether a quota or a goal was intended.

Awards

Introduction: Awards in the extra duty area are diverse and include monetary awards. Recalling that many extra duty grievances involve two or more teachers, the availability of monetary awards could become significant. When monetary awards are a possibility, it may be useful, prior to arbitration, to weigh the amount of money that may be recovered by the grievants against the potential cost of the arbitration process itself. In some instances a settlement may be less expensive than going to arbitration, unless an important issue of principle is involved.[74]

Self Help: It is useful for potential parties to keep in mind the rule of "work now - grieve later." Arbitrators are not inclined to permit either party to violate a work rule or contract in order to remedy what the party considers to be a prior contract violation by the other side.[75] It is particularly important to teachers since their self-help activities might be considered a reason for the arbitrator to reduce an award in their favor in an otherwise winning arbitration case.[76]

Proof: An important element in the request for any award is adequate proof. Not only must the grievance be proved, but the need for a particular award must be proved. This may be particularly important where a monetary award is requested, such as in extra duty cases. One arbitrator stated:

> Neither the Union nor the Employer directed arguments to the matter of the rate of pay which is appropriate for teachers to be compensated if the arbitrator should decide that teachers...were entitled....I therefore do not believe that I could properly make an award which would be more specific than requesting payment of...the rate of pay which is appropriate....[77]

Similarly, where a grievance charges a school district "arbitrarily" exceeded class size limitations, the union must be ready to prove it was "arbitrary."[78] Both grievances and defenses frequently contain more than the parties are able to prove.

Emergency Situations: The contract may permit the school district to order teachers to perform extra duties, under compensation schemes also to be found in the contract. Teachers may "volunteer" for extra duty in extreme situations (e.g., staying with students when a blizzard kept students in school for three days). No award may be warranted for such volunteers.[79] In the absence of volunteers or contract provisions, the existence of a true emergency may permit suspension of the contract.[80]

A true emergency appears to be claimed more frequently than a school district can actually prove:

> An emergency situation is not only an unforeseen condition, but one which is beyond the reasonable powers of the Board to foresee and to prevent.[81]

An emergency must come and go, it cannot be a "continuing" condition.[82] The bargaining history may be useful in defining the term "emergency" as used in a contract. It suggests an extreme situation. In one case, contractual "emergency" was found to mean "riot conditions," not mere disorder.[83] The coming of the Bi-Centennial celebration was not an emergency for purposes of assigning extra-duty, special classes on the Constitution.[84] Examples of the absence of an emergency are far more frequent than examples of emergency situations which qualify under the contract.

Declaration of Rights: Here, as in other areas of arbitration, the award may consist solely of a declaration of rights. That is to say, the arbitrator may simply find that the contract was not violated and make no further award.[85] The passage of time may have mooted all other remedies except a declaration of rights.[86] Furthermore, there may be mitigating circumstances that diminish the award. The limited nature of the extra duty, the reasonableness of the demand, and the good faith of the school administration may be seen as a factor mitigating against extensive remedies.[87]

In a number of cases, the award will be limited because of the *de minimus* character of imposition of extra duties on the teachers. In one case, a five minute change in the school day was *de minimus* in the circumstances.[88] Required attendance at a meeting during a preparation period may be found to be *de minimus*.[89] However, in another case, a five minute assignment that was continued during the entire school year was not found to be *de minimus* because of its continuing nature.[90] In another case, the award involved a total of 63 minutes of bus duty arising from having to stay late on five occasions over the year.[91] Again, presumably the major problem was the continuation of the violation over the year rather than the total sum of minutes at issue.

Related to these cases are ones in which the major award is a cease and desist order from the arbitrator. In these cases, the school administrator is simply ordered to stop the particular act that is causing the contract violation.[92] There is no evidence of the use of general, non-specific cease and desist orders.

Pay and Compensation Time: The arbitrator may award back pay in appropriate cases. The pay might be to cover lost preparation periods,[93] lost non-teaching periods,[94] lengthened class periods,[95] or chaperoning.[96] Compensatory time off may be awarded in similar circumstances.[97] Presumably, the compensatory time off will be used at a mutually agreed upon time.[98]

Miscellaneous Awards: Another type of award may be the arbitrator's direction to mutually negotiate a settlement.[94] In such circumstances, the arbitrator may retain jurisdiction for future needed enforcement.

The passage of time and the school calendar may impact the award. In one case, the arbitrator ordered that the class load of teachers be reduced beginning the next school year.[100] In another, the award ordered that a coaching position, taken out of the unit and filled by administrators, be posted and applications received from unit members after the baseball season was over.[101]

In several cases, the arbitrator noted the need for cooperation and greater communication between the parties along with other remedies. The arbitrator cannot, of course, mandate "good" relations. In these cases, however, the arbitrator "strongly" advised or recommended that the parties discuss aspects of the problem and potential solutions.[102] In one unique case, suggestive of possible overall problems in the relationship between the parties, the school was ordered to write a letter of apology to a grievant who had not received notice of a meeting.[103] However, such personalized awards are extremely rare.

Conclusion

Extra-duty grievances and defenses represent several basic conflicts. Among the teachers' goals are the maintenance of their income for a given amount of work (with extra work meaning extra income); some control on class size; some protection for non-class working time; and a definition of teaching status that emphasizes the "professional" aspects of the work and minimizes or eliminates the more menial elements of the position. Related to the teachers' goals is a union (i.e., organizational) interest in maintaining the integrity of the unit work.

Among the school district's goals are a need to maintain flexibility in the assignment of personnel during the day and during the year, maintenance of the integrity of the budget both in overall amount and in the chosen priorities, reservation of the power to carry out its "educational goals," and recognition of the reasonableness of its decisions.

If the negotiating relationship permits, some of these problems can be defined with more or less clarity in the contract. These include major portions of income protection and non-class working time. When these problems are not susceptible to a negotiated solution at the moment, a negotiated solution may be possible in the future, if the parties agree to confer before final solutions are made. Some of these problems may remain largely within the domain of the arbitrator. These include the reasonableness issue, conflicting views on the nature of an alleged budgetary "crisis," and the abstract definition of the "normal" obligations assumed by one taking a teaching position.

Extra-duty grievances emphasize the specific language of the contract. Wh[illegible] that language is incomplete (e.g., the grievant is a librarian and the contract speaks only of "teachers"), difficult problems arise. Great care is needed in drafting the contract to insure that it repleats as much of the complete school picture as is possible under the circumstances. It is useful to include both language of minimum amounts of work as well as maximum amounts of work when feasible.

As with other grievances, it is essential that the matter be presented on a factual basis to the arbitrator. Presentations that are essentially philosophical abstractions (such as major reliance on notion of "educational policy") or hypothetical (a "better" work schedule is...) are not the strongest arguments that the parties can use and are not the most useful to the arbitrator.

The shortness of the school calendar compared to the time it takes to process a grievance requires that special attention be given to the awards problem. Once the school year has passed, it will be impossible to rearrange that year's work schedule. The flexibility of the arbitration process is a major asset here. However, the proponent of a specific award must be prepared to prove the need for it and not merely allege its significance.

Footnotes

1. 78 AIS 1.
2. 102 AIS 14.
3. 97 AIS 18. See also 97 AIS 10.
4. 114 AIS 3. See also 98 AIS 16.
5. 103 AIS 14.
6. 100 AIS 8.
7. 89 AIS 7.
8. 97 AIS 18.
9. 91 AIS 17.
10. 104 AIS 17.
11. 70 AIS 18. See also 116 AIS 18.
12. 86 AIS 16.
13. 91 AIS 18.
14. 75 AIS 12. See also 73 AIS 1.
15. 55 AIS W-7.
16. 78 AIS 1.
17. See 78 AIS 1 and 51 AIS AW-8.
18. 87 AIS 7.
19. 71 AIS 11.
20. 91 AIS 25; 85 AIS 11.
21. 83 AIS 12.
22. 100 AIS 15.
23. 100 AIS 2.
24. 108 AIS 15.

25. 116 AIS 4.

26. 85 AIS 21.

27. 83 AIS 2. But see 96 AIS 11.

28. 74 AIS 7.

29. 80 AIS 23.

30. 103 AIS 18.

31. 67 AIS 6.

32. 80 AIS 1.

33. 70 AIS 2.

34. 55 AIS W-3.

35. 87 AIS 7.

36. 93 AIS 4.

37. 104 AIS 15.

38. 90 AIS 14.

39. 94 AIS 1; 75 AIS 11; 70 AIS 1.

40. 94 AIS 1; 73 AIS 14.

41. 47 AIS W-9.

42. 91 AIS 25.

43. 77 AIS 13.

44. 72 AIS 6.

45. 95 AIS 5; 71 AIS 6.

46. 115 AIS 9.

47. 70 AIS 17.

48. 56 AIS ABTU-11. See also 97 AIS 9; 93 AIS 3.

49. 95 AIS 20.

50. 73 AIS 26. See also 116 AIS 9.

51. 116 AIS 9.

52. 100 AIS 12; 77 AIS 17.

53. 94 AIS 16; 85 AIS 15; 78 AIS 10.

54. 104 AIS 22.

55. 95 AIS 4.

56. 103 AIS 3.

57. 116 AIS 14; 73 AIS 10.

58. 114 AIS 8.

59. 56 AIS NH-5.

60. 89 AIS 16; 80 AIS 6; 77 AIS 11. See also 83 AIS 10.

61. 89 AIS 16.

62. 88 AIS 6.

63. 73 AIS 8.

64. 93 AIS 7.

65. 97 AIS 16.

66. 74 AIS 14.

67. 93 AIS 1.

68. 63 AIS 2. See also 92 AIS 8.

69. 83 AIS 21; 74 AIS 11.

70. 97 AIS 16.

71. 92 AIS 8.

72. 74 AIS 1.

73. 77 AIS 18.

74. 70 AIS 15.

75. 114 AIS 3.

76. For related cases, see 93 AIS 3; 74 AIS 5.

77. 102 AIS 14.

78. 98 AIS 9.

79. 111 AIS 12. But see 93 AIS 3.

80. 83 AIS 5; 80 AIS 12; 52 AIS W-3.

81. 52 AIS W-3.

82. 50 AIS AB-7.

83. 94 AIS 17. See also 74 AIS 10; 73 AIS 14.

84. 83 AIS 11.

85. 97 AIS 16.

86. 52 AIS U-8.

87. 113 AIS 6. See also 94 AIS 17.

88. 76 AIS 8.

89. 70 AIS 1.

90. 44 AIS W-5.

91. 49 AIS HX-10.

92. 95 AIS 5; 83 AIS 2.

93. 94 AIS 1; 75 AIS 11; 74 AIS 5.

94. 55 AIS W-7.

95. 91 AIS 18.

96. 55 AIS AP-9.

97. 113 AIS 1; 80 AIS 12; 77 AIS 3.

98. 113 AIS 1; 80 AIS 12.

99. 77 AIS 20; 74 AIS 12. See also 67 AIS 18.

100. 51 AIS AW-8.

101. 56 AIS ABTU-11.

102. 108 AIS 15; 63 AIS 17.

103. 70 AIS 15.

SCHOOL ARBITRATION: WHAT THE ARBITRATORS ARE DOING

Chapter 9 - Assignments and Transfers

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Introduction

Of the cases studied, the number of assignment and transfer cases was nearly equal to the number of evaluation cases. It was the third most likely issue to be arbitrated. The grievance was most frequently brought by an individual grievant. Group grievances (involving two or more grievants) were filed in only half as many cases as individual grievances. Slightly less than 30 percent of the grievances were filed by female teachers, while about 35 percent were filed by male teachers; the remainder were filed by a class or group.

Assignment and transfer grievances will be examined from four perspectives. First, the substantive disputes will be broadly considered in the areas of voluntary requests or applications for a particular assignment. Secondly, attention will be given to involuntary assignments or transfers. Thirdly, the impact of grievances on the structure of the collective bargaining unit will be briefly considered. The final matter will be a short review of the range of possible awards.

A case involving an assignment or transfer issue may also involve other issues. A disputed assignment or transfer may be caused by a budget problem. An assignment or transfer dispute may involve the assignment of an extra duty. The main focus in this section, however, will be upon the assignment or transfer aspect of the grievance.

The Contract: The contract is likely to contain a number of clauses relating to assignments and transfers. Obviously, these provisions will be the focus of the arbitrator's attention. Common provisions include seniority provisions, notice provisions, clauses requiring the posting of existing vacancies, provisions recognizing identified preferences, and clauses requiring a statement of reasons for making a transfer. Assignment of personnel also will often be viewed as an inherent management right.[1] The arbitrator will need to strike a balance between the management right and the contract right.

Voluntary Assignment and Transfer

Introduction: A new assignment, or transfer to another location might occur because the teacher voluntarily sought it out and was accepted, or because it was involuntarily imposed. This section deals with the voluntary type of assignment and transfer. A major concern in these cases is whether the contractual criteria have been properly applied. Paramount among these criteria may be recognition of various preferences. When a person is contractually entitled to a preference over other candidates for a position in the district and is rejected in favor of a candidate who is not entitled to such a preference, a grievance is likely to result.

Seniority Preferences: Contracts commonly contain clauses which give a preference to persons with greater seniority when new opportunities becomes available. The preference may be expressed in a variety of different ways. Some are indicated below:

1. Absolute preference: The most senior person is entitled to the position. The only issue will be the measurement of seniority. This type of preference was rare in the cases studied.
2. "Hybrid" or modified seniority clause: Seniority is one of several factors to be considered which are weighed equally. A major issue will be whether the factors were properly weighed.
3. "Relative ability": Seniority is considered only if the applicants are found to be otherwise equal.[2]

4. Restricted seniority: Seniority governs unless it interferes for example, with a special assignment.[3] A variation of this theme is to require qualifications to meet a minimum level. Once that minimum is achieved, seniority governs. Under this approach, the school district could not properly make an assignment to the "more" qualified candidate, since only qualification at a minimal level is required by the contract.[4]

Another type of restricted seniority provision provides seniority preferences only when candidates are equally qualified.[5] If they are, the seniority provisions apply, and the senior applicant gets the job. If they are not, seniority is not a consideration for selection. Consequently, if a less senior candidate is found to be "more" qualified,[6] the applicant may be given the job because the seniority provisions provides for a seniority preference only for equal candidates.[7] However, finding that the applicants are equally qualified is often a difficult task. Arbitrators have done so by finding that candidates have a "relatively small difference in ability,"[8] which then triggers the seniority preference.

One issue is the role of seniority, another is the measurement of seniority. For example, a problem in the measurement of seniority begins when a person moves from the collective bargaining unit to a non-unit (e.g., administration) position within the school district and later returns to the unit. In such a case the issue is whether seniority is based on the entire period of employment or only on the time spent in the unit. One arbitrator ruled that it should be measured from the date of first employment.[9] Yet another issue is the breadth of the application of the clause. Do the parties intend that it apply to transfers within a building or from one school to another, or both? One arbitrator, on the facts of the case, found it to apply to both the building and the district.[10]

Unit Membership Preference: A number of contracts give a preference to an "in-house" or "in-district" teacher over applicants from outside of the system. This preference may be expressed in either of two ways. It may be one factor, among others, to be merely considered or it may be a determinative factor, only when a finding is made that the candidates are otherwise equally qualified. In such a case, an arbitrator ruled that the school district employer could make the determination of whether the candidates were in fact equal. That determination would be reviewable in arbitration for reasonableness (arbitrary and capricious).[11] The arbitrator would not redecide the factual issue. Another arbitrator may have gone further than this decision, when the arbitrator ruled that the school board must show by objective and overt evidence and actions that they gave consideration to the preferred applicant as demanded by the contract.[12] This might be done in part by interviews or giving explicit reasons for the choice that was made. Under this type of decision, less explicit language of preference may be needed in the contract.

A variation on the preference theme was shown in a case which involved a contract that give "full time" faculty first priority for teaching summer school courses and stated that faculty would be assigned to no more than two courses. The faculty read this preference as a quarantee of two courses. The arbitrator read the contract to mean that the teachers' qualifications would still have to be examined and only qualifying teachers would be given a preference. The mention of the preference and the two-course limitation did not constitute a quarantee of work to any "full time" teacher who applied.[13] Note that what is at issue is unit membership and not union membership. A preference for union membership is likely to violate statutory law in many jurisdictions.

A significant problem in the use of such preferences is to determine the parties' intent because the contract language may not be clear. For example, where a contract provided that unit members would get "first" consideration, an arbitrator stated:

> There is no mention whatsoever of the manner in which the factors of skill and ability shall be determined and applied. Therefore, in the absence of any contractual limitation on its reserved managerial rights, the Board has retained the right to determine which of the applicants...has the greater qualifications. Of course, in the exercise of that right, the Board may not act arbitrarily or capriciously.[14]

Consequently, the mere statement of a preference in the contract may not result in a substantial advantage to the preferred class (i.e., limit the school employer's discretion) unless both the nature of the preference and the role of the preference are spelled out in some detail in the contract. At times the union's position appears to be that the statement of a preference creates a near automatic decision in favor of the preferred class. This position is not always convincing.

Posting Requirements: A number of contracts require that vacancies in the unit be posted so that teachers can then bid for available positions. This knowledge may be useful when making a request for a voluntary transfer or when stating a "preliminary preference" in the event that the teacher is faced with an involuntary transfer. The posting requirement may be strictly construed where it applies.[15] The posting requirement may, by the terms of the contract, apply only to promotional positions so that the failure to post other types of positions would not violate such a clause.[16] The posting requirement may be applicable only to unit positions. Consequently, the failure to post a supervisory position (i.e., non-unit positions) would not violate this type of clause.[17]

The posting requirement may only cover "vacancies." The issue then becomes one of defining a vacancy. The school administrators may be permitted to make reassignments or involuntary transfers first, and a "vacancy" might no occur until a position is found to be left over after management's actions are complete.[18] In a reduction-in-force situation, one arbitrator ruled that teachers may be deemed surplus (presumably no positions are "vacant" for them to fill) even though a few more classes existed than could be assigned to the remaining teachers.[19] Another arbitrator ruled that the determination of whether a vacancy exists is a matter of management rights,[20] although presumably, such a determination was "reasonably" made.

Other Considerations: Affirmative action requirements may affect assignments and transfers. Discrimination is discussed at length elsewhere. It is only noted here that sex may be a bona fide occupational qualification for some jobs, in the eyes of some arbitrators. Thus, in all girls PE class, the job description may be found to require a female teacher.[21] In such a situation, a seniority preference may not play a role for a rejected male applicant.

The fairness of permitting an applicant for a position to occupy it on an interim basis, before final selection was considered in another case. In the case, the arbitrator found the interim appointment to be a true assignment. If the assignment had been a "test period," and if the other applicant had not been similarly "tested," the arbitrator may have found the appointment to be unfair, but such was not the case.[22]

Another issue involves qualifying for a promotion. A condition of the promotion, for example, may be the possession of a doctorate. If the rule is strictly followed, and the applicant does not obtain the degree, the promotion may be denied. Where, however, the institution has recognized exceptions or alternative approaches, the applicant should be permitted similar exceptions.[23] A careful analysis of past practices would seem to be useful.[24]

Involuntary Assignment and Transfer

Introduction: Involuntary assignments and transfers raise a host of grievances. The grievances may involve the imposition of a position or location that is felt by the grievant to be undesirable. Other grievances may involve the involuntary loss of a desirable position, such as a paid extra duty position, that is felt by the grievant to be unfair. The center of attention will be the contract.

> Especially when the Board has power to act over possible objection of the Association or of individual teachers, it is important that the Board take its action only after following all the procedural steps to which it agreed.[25]

Solicitation of Volunteers: A contract may require that a school district first seek volunteers prior to compelling an involuntary transfer. That procedure should be followed. Where a school district made an involuntary transfer without first seeking volunteers, the arbitrator ruled against the school even though the school district based its good faith selection on a teacher whose transfer would cause the least disruption to the students.[26]

Seniority: Seniority issues arise in involuntary transfers, as well as in voluntary transfer situations. Seniority may play one of several roles. It may be one of several criteria to be considered, that is, balanced with other factors.[27] A senior teacher may be permitted to "bump" a junior teacher and avoid a transfer. The right to "bump," however, may be limited to situations where the senior teacher can perform in the same manner as the junior teacher. In one such case, a senior teacher was found to be properly placed on the surplus list where the junior teacher was also the department head, a position refused by the senior teacher.[28]

An interesting and complex seniority issue involved a teacher who taught both mathematics and social science. As a math teacher, the teacher had enough seniority to avoid transfer. However, the teacher was currently doing social science classes and was a junior member of the social science department. The arbitrator found that for transfer purposes, the teacher should be treated as a social science teacher (i.e., little seniority) and was properly transferred. The arbitrator indicated that in a discharge situation (as opposed to a transfer), total service, not departmental service, would be used.[29] The contract was silent on the issue of how seniority will be measured when a teacher has recently changed subject areas.

In another situation, a teacher of music taught at both a junior and senior high school. Subsequently, a new junior teacher was brought into the high school music program, reducing the amount of time grievant spent in the high school. Grievant still taught in both schools, but now a majority of time was in the junior high school, contrary to the grievant's wishes. The arbitrator ruled that this was tantamount to a transfer and that his seniority accorded the grievant the choice of schools.

Some contracts provide that a teacher shall not be denied a "professional advantage." This phrase is not well defined in the cases. It may relate to the seniority issue. A denial of professional advantage may occur if a teacher is denied a new position or transferred from an old position, in favor of another, and either position specifically relates to the teacher's skills and experience.[30]

Transfer and Discipline: The teacher may grieve a transfer because the teacher feels that the transfer is being used to discipline the teacher. It is commonly held that the basis of a transfer or reassignment cannot be grounded in the desire to take reprisals against the teacher, particularly when the reprisals may involve the teacher's union activities.[31] Where such a claim is made, however, the union will have the burden of proof.[32] It is frequently alleged, but difficult to establish. A related issue involves the transfer of union officials. Teachers, who hold union offices, may be accorded "superseniority" by virtue of the contract. This type of seniority may override the seniority of other teachers both in transfer and layoff situations.[33] Among the purposes of such superseniority is an effort to maintain the continuity of union operations and leadership.

Unions may attempt to characterize a number of involuntary transfers as being disciplinary in nature. A contract may expressly prohibit disciplinary transfers. In such a case, the school district may argue that the transfer was not for disciplinary reasons. However, if the transfer accompanies other actions which were clearly punishment, the arbitrator may find the transfer to also be punishment.[34] On the other hand, a teacher could not get along with a new principal, where the transfer was permissable to maintain "school governance," and was presumably not disciplinary action.[35]

Reasons: Contracts commonly require the school district to give reasons for its actions. The requirement may be explicit[36] or implicit. 'It may be implied in contract language such as "when involuntary transfers are necessary...."[37] Under such a clause, the arbitrator said that the effect of the clause was that school district must provide some rational reason for a transfer. Another contract gave a preference to current employees when new openings came. The school district did not honor the preference. The arbitrator said that the contract implied that there must be some tangible support for the determination.[38] The requirement for reasoned decisions appears to be particularly strong in those types of cases where the contract puts some limitation on the management right. These cases frequently require the school district to meet a reasonableness review. While the school may have considerable latitude in making these decisions, the arbitrator may review them to determine whether the decisions are arbitrary, unreasonable, capricious, or discriminatory.[39]

Other Considerations: When teachers are involuntary transferred they may also lose paid extra duty assignments that went with their old position. Commonly, the extra duty assignment does not have tenure protection and is not subject to a just cause provision. The decision to give the incumbent teacher the assignment may essentially be reserved as a management right. Even in those circumstances, however, "this is clearly not a license to act in an arbitrary, capricious manner without any logical or factual basis...."[40] Frequently, the issue of whether to reassign a teacher to a paid extra duty position will not be based on findings of competency or performance.[41] If the transfers, which resulted in the loss of the extra duty, is valid a grievance claiming the unfair loss of the extra duty position will not be sustained.

In other situations, however, an extra duty assignment may be attached to a teaching position. For example an extra duty coaching position may be combined with a teaching position. Unless the potential transferee has both teaching and coaching skills, the person would not qualify. While such combination positions are normally established in good faith, if such a combination is made for the purpose of disqualifying a teacher from a transfer, it might be found to be arbitrary and unreasonable.[42]

Affirmative action considerations may play a role in involuntary transfers. A contract may provide that vacancies will be filled upon consideration of program needs, seniority, and affirmative action. In one case, an arbitrator ruled that the combination of program needs and affirmative action would out-balance grievant's seniority claim.[43] On the other hand, a school district that based a transfer on maintaining a "gender balance" in the PE department was found to have violated the seniority provisions of the contract.[44]

In one case, an individual returning from a leave of absence was improperly transferred. The contract provided that teachers returning from a leave would return to their prior position unless it could be shown that the transfer would have occurred regardless of whether the teacher took a leave. The school district lost the case because it could not show that the transfer would have occurred anyway.[45]

Generally, arbitrators will reject grievances that are still at the speculative stage. However, one arbitrator found that a school district's efforts to anticipate the impact of tax revolt legislation when making transfer plans was not a hypothetical or speculative process.[46] A liberal view of the general requirement for injury or harm rather than simply the anticipation of some future injury was expressed by one arbitrator as follows:

> There are other types of injury (than loss of position) which must be accepted as harmful and sufficient justification for a greivance. The stress and anxiety that must necessarily follow from the uncertainty created by the termination letter...is injury enough.[47]

Individual Contracts: Where a transfer is made to a different position, and that position is within the collective bargaining unit, the collective bargaining contract will control the terms of employment. The school district cannot negotiate an individual contract (by passing the union) on the basis of the transfer:

> Once he decided to hire her, he had no power to alter the collective agreement, by negotiating...[with] her. If this may be done...then it would follow that whenever a teacher wanted a different assignment...the Superintendent could use that person's desire as a bargaining lever to obtain an agreement to accept less salary than the agreement provides.[48]

The Collective Bargaining Unit

Assignments and transfers are important managerial prerogatives that may be limited to some extent by the contract. They are issues which may alter the very structure of the school system. In addition, they are issues that may relate to the structure of the collective bargaining unit. A number of grievances directly or indirectly raise the problem of the relationship between the school district structure and the collective bargaining unit. One example is the creation of new administrative positions outside of the unit, which are filled by unit members. Another situation is when a unit job is taken over by an administrator. Administrators, as supervisors, are usually outside of the teacher unit.[49] Arbitration decisions are not always clear on how the measure of unit work is to be made. One arbitrator said:

> The Board may have acted in good faith with no intent to diminish the bargaining unit but that was clearly the effect. By not employing a counselor the Board caused the unit to be reduced by one....[50]

This arbitrator sought to protect the number of positions in the unit. Another arbitrator may view the quantum of work, and not the number of positions, as the important factor.

> The controlling factor in preserving the integrity of the bargaining unit is not necessarily the number of positions found within the bargaining unit, but rather the controlling factor is that the bargaining unit not be deprived of the work which rightfully belongs in the bargaining unit.[51]

Defining what work belongs to the unit and what does not is difficult. One panel of arbitrators approached it as follows:

> Evidence introduced at the hearing was insufficient to indicate exactly which work belonged in the bargaining unit, and which work may properly be outside of the jurisdiction of the bargaining unit. It is therefore necessary for the parties to meet in negotiations to determine what duties should be returned to the bargaining unit.[52]

An important clause in the contract used in determining this issue is the recognition clause. This is because this clause attempts to define the range of employees which the employer agrees to cover by the contract. As one arbitrator pointed out, however, the recognition clause is not a job security clause.[53]

The union may claim that in creating a new non-unit position, a unit position is being taken away from the unit. To sustain this claim, it is necessary to show that the allegedly improper non-unit position is identical or nearly identical to the unit position. In one such case, an arbitrator found that, in the absence of showing that the two (unit and non-unit) positions were identical, there was no necessary infringement on the unit's integrity. The fact that the unit position remained vacant did not mean that it had been abolished.

Related to the problem of reducing unit work is the matter of filling vacancies in unit work. Often the unit will be defined as full-time teachers. If a unit vacancy occurs, and the school administration seeks to fill the vacancy with part-time (non-unit) teachers, there is an effective loss of unit work.[54]

The issue of filling unit positions is distinguishable from filling non-unit positions. A unit teacher may have no greater rights than an outsider in bidding on a non-unit position.[55] This result occurs because the contract typically covers only unit work. It may be that management is willing to negotiate its rights regarding non-unit positions, but any limitations on management's rights in these areas must be explicitly spelled out in the contract.

Awards

A variety of different grievants arise in the assignment and transfer area. To meet this variety, an equally varied group of remedies are needed. The arbitrator may exercise the power to move personnel. Where a teacher has been involuntarily transferred and the transfer has been found to be improper, several different awards may be appropriate. The grievant may be awarded reinstatement in the old position.[56] The reinstatement may be immediately effective in some cases, but in some other cases it may be delayed until the following school term or school year in order to minimize disruption.[57] If the contract provided that volunteers must be sought before a teacher is involuntarily transferred, the award may be that the school must seek volunteers. If one is found, the involuntarily transferred teacher may be reinstated to the prior position.[58] Where the teacher cannot be returned to the prior position, the award may be to give the teacher first choice to any new openings occurring in the next school year.[59]

The contract may require that certain procedures precede the decision to assign or transfer. Where those procedures have not been followed, the arbitrator may order compliance with the procedures even though the school district has already made a decision. For example, some contracts require vacancies to be posted. The school district may improperly fill a position without following the posting requirement. The award may be to reopen the position and require it to be posted. This gives the grievant an opportunity to apply, but it does not necessarily require the grievant to be selected. Where a grievant has not been given "fair consideration," the arbitrator may order the school to give the appropriate level of consideration to the grievant. For example, where a preference is accorded unit members but the school improperly hires a non-unit member to fill a position, the award may be that the grievant be given fair consideration for the next vacancy.[60] The difficulty in these cases is that the grievant usually cannot show that the grievant would in fact have been selected even if the contract had been followed. Requiring the school to accept the grievant's application might be viewed as too great an inroad into management's rights. The result is to merely require the district to fairly consider the grievant at some future point.

> There was no guarantee that the grievant would have been the successful candidate if such advertising had taken place, because it must be clear that the Board, having advertised the position, still retains its authority to fill the position as limited by other Board procedures and the contract....[61]

When a seniority preference was improperly denied, the grievant is occasionally awarded the additional income that the grievant would have received had the grievant been selected for the position.[62] In other situations the grievant is awarded the disputed position.[63]

Here, as in other awards, the school year calendar may delimit the use of some transfer remedies. If so, the arbitrator may simply require the school district to adhere to the contract in the future.[64] Finally, a loss may have to be shown to be more than de minimus to merit an award.[65]

Footnotes

1. 95 AIS 14. See also 86 AIS 13.
2. 102 AIS 10.
3. 74 AIS 19.
4. 115 AIS 21.
5. 87 AIS 6.
6. 91 AIS 14; 91 AIS 1; 80 AIS 22.
7. 100 AIS 22.
8. 96 AIS 1.
9. 71 AIS 14.
10. 91 AIS 14.
11. 96 AIS 21. See also 71 AIS 16.
12. 83 AIS 3.
13. 83 AIS 6.
14. 95 AIS 7.
15. 91 AIS 21; 75 AIS 15. See also 94 AIS 9.
16. 94 AIS 9.
17. 91 AIS 21.
18. 111 AIS 8. See also 115 AIS 6.
19. 102 AIS 1.
20. 115 AIS 19.
21. 96 AIS 5.
22. 91 AIS 14.
23. 96 AIS 10; 77 AIS 10.

24. 115 AIS 18; 95 AIS 14.

25. 101 AIS 10.

26. 74 AIS 17.

27. 115 AIS 1; 80 AIS 18. See also 115 AIS 14; 77 AIS 21.

28. 115 AIS 12.

29. 113 AIS 15.

30. 62 AIS 17.

31. 93 AIS 2.

32. 114 AIS 13; 111 AIS 20.

33. 116 AIS 17.

34. 72 AIS 7. But see 73 AIS 3.

35. 72 AIS 7.

36. 55 AIS W-7.

37. 95 AIS 17.

38. 106 AIS 9.

39. 111 AIS 13; 95 AIS 19; 89 AIS 9; 56 AIS JM-16.

40. 84 AIS 16.

41. 71 AIS 13.

42. 89 AIS 2.

43. 70 AIS 10. See also 70 AIS 5.

44. 115 AIS 1.

45. 74 AIS 2.

46. 111 AIS 20.

47. 92 AIS 12.

48. 95 AIS 15.

49. 72 AIS 20.

50. 114 AIS 14.

51. 110 AIS 11.

52. 110 AIS 11.

53. 108 AIS 14.

54. 115 AIS 19.

55. 112 AIS 5; 75 AIS 20.

56. 115 AIS 1.

57. 115 AIS 14; 55 AIS AT-8.

58. 74 AIS 17.

59. 73 AIS 3.

60. 83 AIS 3.

61. 92 AIS 17.

62. 96 AIS 1. See also 55 AIS M-12; 55 AIS G-11.

63. 115 AIS 21; 83 AIS 9.

64. 102 AIS 20.

65. 101 AIS 10.

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What Is Missing?

At least two elements were missing in the cases studied. One was the relatively few number of cases involving the non-teaching staff who play an essential role in the operation of any school. These include the lunch room employees, bus drivers, aides, custodians and maintenance personnel, and secretarial staff. In terms of total employment, teachers and non-teaching staff, non-teaching employees might easily represent 40 percent of the total. These employees are commonly not represented by the same union that represent teachers. It would seem that their numbers and importance would require greater study and representation in the cases than was found. It would appear to be an area needing further research.

Another element missing in most of the arbitrator's discussion is the mention of the "public interest." It may well be that many feel the arbitrator should not be viewed as a public representative in any manner. It is possible there is cause for some fear that arbitrators may assume too much authority if they attempt to address the public interest. On the other hand, the public may deserve some recognition and role in the public sector arbitral process, distinct from the views of school management, teachers' unions, and the courts.

A possible "public" role of public sector arbitrators was discussed in an arbitration award concerned with the "minimum manning" of a fire department. The arbitrator ruled that there should be a limit to staff reductions (manning) and that limit was dictated "by levels of safety to the public and the levels of reasonable danger to the firemen."[1] The courts overruled the decision, but the arbitrator made a thoughtful reply to the dismissal in a subsequent article which is well worth considering.[2] In sum, in these days of open government, open meetings, open records, sunset laws, and other forms of public involvement in the public's business, it seems unlikely that public sector arbitrators can continue the tradition forever of simply following private sector arbitrator.

Attitudes Toward Arbitration

Attitudes toward grievance arbitration vary. It is useful to briefly look at some of these attitudes because the attitude may directly affect how the arbitration process works and how it is used. In the private sector, grievance arbitration has been given an extremely broad and favorable approval by the federal courts. This, in turn, is reflected in the manner in which the parties view the subject. In three cases, commonly referred to as the "Triology,"[3] the United States Supreme Court expressed great deference and encouragement to the use of grievance arbitration in the private sector. The Supreme Court variously stated:

> A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.
>
> * * *
>
> But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement.
>
> * * *
>
> The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts.
>
> * * *
>
> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law--the practices of the industry and the shop--is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring

> to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.[4]

In summary, the U.S. Supreme Court spoke approvingly of grievance arbitration because it fosters improved relationships between the parties, it focuses upon the particular requirements of the parties, it provides for a voluntary, internal solution to disputes, and it uses arbitrators who have a special competence in resolving disputes not shared by others. Even though the Triology comes from the private sector, it may be cited as persuasive authority by arbitrators in public sector school arbitrattion.[5]

The public sector collective bargaining process is claimed, by many, to be significantly different from the private sector. One reason for these differences may be found in the state by state legislation which delimits the availability of collective bargaining to public employees, such as teachers. One of the more extreme, negative attitudes toward public sector grievance arbitration was taken by the New York Court of Appeals, although the status of the particular decision may be open to some debate. The Court of Appeals stated, in the Liverpool case:

> In the field of public employment, as distinguished from labor relations in the private sector, the public policy favoring arbitration--of recent origin--does not yet carry the same historical or general acceptance, nor, as evidenced in part by some of the litigation in our Court, has there so far been as similar demonstration of the efficacy of arbitration as a means for resolving controversies in govern-

> mental employment. Accordingly, it cannot be inferred as a practical matter that the parties to collective bargaining agreements in the public sector always intend to adopt the broadest permissible arbitration clauses. Indeed, inasmuch as the responsibilities of the elected representatives of the tax-paying public are over-reaching and fundamentally nondelegable, it must be taken, in the absence of clear, unequivocal agreement to the contrary, that the board of education did not intend to refer differences which might arise to the arbitration forum. Such reference is not to be based on implication.[6]

In summary, the New York Court of Appeals seemingly rejected the broad and positive attitude that the private sector Triology courts adopted. This rejection is purportedly based upon the alleged differences between public and private sector collective bargaining.

The Triology and Liverpool express two major opposite attitudes toward grievance arbitration. As such, they are useful benchmarks to aid in understanding how the arbitrators and the parties will relate to one another. Ultimately, it is those attitudes, those of the arbitrator and the parties, which will indicate the success or failure of the arbitration system as it relates to teacher disputes. If the parties use the grievance process with a positive, problem-solving state of mind, profit from the use of the process will increase. If the parties use the grievance process with a negative, harrass-the-other-side state of mind, the grievance process will not function well. Evidence of both attitudes is found in the arbitrators' decisions. One arbitrator stated the following:

> Without pointing a finger at eigher party, there is indication that the relationship lacks stability. The arbitrator can only suggest that the parties at the highest level reevaluate their acceptance and approach to each other in the light of their apparent future long term association.[7]

Another arbitrator stated:

> It is discouraging to find this issue in the case. Arbitration in the public sector has come sufficiently of age that this sort of tack serves no useful purpose and only obscures and delays resolution of the real issues...[8]

Yet another arbitrator stated:

> The Association, which is likely to participate in such future inquiries, is cautioned to assist the administrator in separating legitimate claims...from those which might not be valid.[9]

It is useful to approach arbitration decisions with an inquiring and critical mind. It is also useful for the parties to become keenly aware of their own attitudes toward the grievance process. Whether one agrees or disagrees with a particular award, may be a reflection both on the merits of the dispute as well as a reflection on the parties' acceptance or rejection of the validity of the grievance process itself.

Based upon the authors' research, their reaction to the case studies is neither as optimistic as the Triology, nor as pessimistic as Liverpool. In making these comments, the authors' rely upon their reading of the cases from the American Arbitration Association, in the Arbitration in the School series. It is recognized that the method of selection of these cases is not necessarily intended to make them totally representative of all cases of school arbitration.

The cases studied showed great variation in the skills of the arbitrators. The better opinions fully reflect the high level of special competence alluded to in the Triology. Other opinions are less sensitive in their approach and less compelling in their analysis. In saying this, it is also recognized that often the arbitrator may have a difficult time rising above the skill or lack of skill of the parties arguing the cases. Also, it may well be true that school arbitration requires a higher level of skill than at least some of the comparable cases from the private sector. As Liverpool suggests, the role of external law, especially in the area of the rights of management, the various sources of financial support for the school budget, and the role played by both parents and students in running the schools are things not found in the industrial sector.

On the other hand, the authors do not share the implied fear expressed in Liverpool that arbitrators are likely to take important powers away from the elected managers of the school. There is little in the cases studied to suggest that arbitrators will readily substitute their judgment for that of management on basic issues of "educational policy." In cases involving individual teachers, on questions of the granting of leave or on the evaluation of individual personnel, an arbitrator may indeed change a decision by school management. However, on basic issues involving groups of teachers, the arbitrators do not appear to advertently or inadvertently attempt to run the schools. Indeed, to the contrary, one could argue that many of the arbitration decisions might be positive factors in forcing school management to become more responsible managers, or to require them to "look down the road" when they make decisions. On a related level, to the extent that substantive issues (as opposed to "legal" issues) are important in the argument, the authors find no real evidence that grievance arbitration results in a delegation of basic substantive decision-making to the arbitrators.

Is There Any Uniqueness to School Arbitration?

School arbitration addresses the grievances of both teachers and non-teaching staff. As indicated above, the vast majority of the cases in the Arbitration in the Schools series deal with teachers. Teachers are a professional class. One might reasonably ask whether there are any unique aspects to school arbitration awards arising from this professional status? Another way of putting the question is to ask whether school arbitration can be significantly differentiated from the much larger number of arbitration awards involving non-professional classes of workers in factories and industry in general?

At a theoretical level it might be posited that there are significant differences. Often one of the characteristics of a professional group of employees is that they have a higher level of responsibility than non-professionals. A related notion might be that management and professionals might be more likely to engage in shared decision-making. This could be particularly true for the teacher-professional because the final product--the education of the student--is so frequently linked closely to the unique characteristics of the individual teacher. Other distinctions may be postulated, but the question remains as to whether the cases studied represent any significant departure from traditional, industrial sector arbitration?

In general, the answer appears to be that the professional classification makes little difference. Private sector industrial arbitration does not seem to be greatly different from school arbitration. The arbitrators themselves rarely mention any significant differences. One arbitrator bluntly states that "A school is not different in general concept than a factory. In actuality, it is a dictatorship in microcosm."[10] Private sector arbitration precedents are commonly used.[11] One arbitrator stated the following:

> The Arbitrator cannot believe that such personnel changes (transfers) are a great deal more complex than layoffs in major industrial establishments...[12]

Where the professional nature of the teacher is mentioned, it often arises in _de minimus_ situations. For example, one arbitrator denied retroactive remuneration for the improper denial of a duty-free lunch period because, in part, it "would be inconsistent with the professional nature of grievant's occupation...[13] Another arbitrator found that the requirement that teachers turn off the lights and close the windows was not "in any way demeaning or unprofessional."[14] To the extent that teachers wish to be recognized as professionals, they have not yet convinced arbitrators that such recognition should be an element in arbitration decision-making.

In one aspect, however, the character of the teacher's job has clearly had an impact on the arbitration process. The teacher's classroom work-year is usually about nine months. This can present significant problems in arbitration. Grievances which arise late in a school year may frequently be left in limbo during the summer break. One of the claimed advantages of arbitration is the speed of the decision-making process. This claimed advantage may be lessened by the practical effect of the school calendar. The calendar also works to the disadvantage of teachers who win their grievance but find that the award will be delayed because of the proximity of the term or summer break.[15] Where an improper transfer[16] or improper assignment[17] has been made, the arbitrator may delay ordering the shift of personnel until the beginning of the next semester or the next school year.

The arbitrator may delay to minimize disruption, to give the students a feeling of stability and continuity, or to maintain a program. In some cases, a monetary award is mooted by the delay.[18] In some cases, such as the bilateral determination of working hours, the end of the school year may effectively preclude any award at all.[19] The calendar would seem to impose special requirements for speed particularly in the filing of grievances. The teacher may have a winning grievance, but the calendar may deny the grievant the fruits of the award. On the other hand, the employer school district may stand to gain in some cases by a slow response time.

In comparison to the industrial sector, the cases show significantly fewer discipline cases than might have been expected. In addition, the majority of the discipline grievances involved males in a workforce which is predominantly female. Determination of the reasons for the small number of discipline desputes would require additional research. Part of the answer may be found in the long probationary period for employees in education (often several years). "Problem" personnel may be dropped from the system through the probationary/non-renewal device. Part of the answer may be that fewer disciplinary activities are being taken with school employees than with private sector employees. If there are not fewer actions, then possibly the disputes are not being taken through the arbitration system. Finally, part of the answer may lie in the nature of the sample of cases used in the study.

Another subject worth noting is the relatively small number of arbitration decisions on employment discrimination. The educational system is virtually awash in special legislature, agency rules and regulations, and judicial decisions on the subject. The enormity of the issue, however, is not reflected in the number of arbitration decisions. This suggests that arbitration is not viewed by many of the complainants as an adequate system of dispute resolution for this issue. The decisions which exist frequently show a lack of sensitivity to the problem. In addition, the arbitration decisions give little attention to the volume of agency and judicial decisions decided in the "external law." To the extent that the arbitrator cannot go beyond the face of the contract on this matter, the complainant may well find a better climate for dispute resolution in other available forums.

In summary, there are some elements that could distinquish school arbitrators from other arbitrators. In the main, however, arbitrators do not identify major unique facets to arbitration in the schools.

Footnotes

1. City of New York Fire Department v. Uniformed Firefighters Association, 66 Lab. Arb. 261, 265 (1976) (Schmertz, Arb.).

2. Schemrtz, The Public Safety and Personnel Cuts in the New York City Fire Department: The Role of the Impartial Chairman, 2 Empl. Rel. L. J. 155 (1976).

3. United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel and Car Corporation, 363 U.S. 593 (1960).

4. United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960).

5. E.g., 97 AIS 7.

6. Liverpool Central School District v. United Liverpool Faculty Association 42 N.Y. 2d 509, 399 N.Y.S. 2d 189 (1977).

7. 101 AIS 19.

8. 92 AIS 14.

9. 101 AIS 4.

10. 58 AIS K-5.

11. For just two of many cases, see 77 AIS 13; 73 AIS 23.

12. 112 AIS 1.

13. 103 AIS 15.

14. 87 AIS 10.

15. See generally the discussion in 58 AIS X-11; 49 AIS A-17.

16. 66 AIS 16; 65 AIS 14.

17. 97 AIS 8; 45 AIS D-14.

18. E.g., 108 AIS 7.

19. 65 AIS 10.

SCHOOL ARBITRATION: WHAT THE ARBITRATORS ARE DOING

Appendix I - Case Examples and Questions

The following nineteen case examples are set out for the reader who might wish to more critically use the information presented in the book. The first series of case examples present issues primarily of a procedural type. The second series of case examples present issues primarily of a substantive type. There is probably no one answer to any problem that is absolutely correct, rather there are several acceptable answers. Reference to relevant prior chapters will indicate the direction that the answer might take.

Case Example 1

You are an arbitrator. You have conducted a 3 day hearing in Los Angeles involving the Consolidated Teachers Union and the Federated School District. The issue involved a matter of personal leave, based on a grievance by a teacher, I. M. Tired. The leave request was denied, but you have decided that the leave request should have been granted under the terms of the contract. Draft, in rough format, what your decision and award might look like, indicating the important subject matter sections that you would include.

Case Example 2

The grievance involves an evaluation issue. A probationary teacher alleges that the contractually required December evaluation observation was not made, but that the teacher received a written warning that she could not expect to receive a renewed contract unless classroom decorum improved. The school district proposes to use 5 witnesses, including complaining parents and two assistant principals. The teachers' union proposes to use eight witnesses, including co-workers, parents and the grievant.

The arbitrator communicates with the parties and poses the following questions to each side. How would you answer for each side, and why would you give that answer?

1. Do you want to use pre-hearing briefs?
2. Do you want to use post-hearing briefs?
3. Will you use an attorney?
4. The use of thirteen witnesses in total is likely to lead to a two day hearing. Is it still your desire to use this number, or can it be reduced?
5. Do you want a verbatim transcript?
6. Do you want an oral decision at the close of the hearing or a written decision at a later date?

Case Example 3

The grievance involves an issue of employment discrimination. The contract provides that "no teacher shall suffer from any form of discrimination which is prohibited." You have researched the issue and investigated the facts. You have found relevant arbitration decisions in the private sector, in the Arbitration In the Schools series, and you have found relevant decisions by state anti-discrimination agencies, EEOC, and the federal courts. In addition, you have a record of the bargaining history, and a credible witness who can testify as to past practices for the past 18 years. In order of importance, in what order would you present the evidence to the arbitrator?

Case Example 4

The collective bargaining contract provides that on October 1, management and union representatives shall meet for the purpose of joint consultation and negotiation concerning the creation of a new procedure for handling issues of discipline of teachers accused of mistreating students in the classroom. The contract also specifically provides that any discipline that is imposed shall be subject to immediate review for fairness and reasonableness by an impartial arbitrator selected in the usual manner. Outline the major procedural steps that such a discipline system might have to contain in order to meet the standard to be used by the arbitrator.

Case Example 5

The contract provides that a grievance must be filed within "10 days of the date on which the disputed event happened." A grievance was filed on the dates indicated below, and the school district defends on the grounds of lack of timeliness. How should the arbitrator rule?

1. The event occurred on November 1 and the grievance is filed December 10.
2. The event occurred on November 1, the grievant became aware of it on January 15, and filed the grievance on January 18.
3. The event occurred on October 1, and involves a pay issue that affects each month's check. The grievance is filed on (a) January 9, or (b) January 18.

4. The event occurred on May 31, school closed for the year on June 1. School reopens on September 1, and the grievance is filed on September 4.

5. If your answer to any of the above is that the grievance is timely, what impact, if any, might the timeliness issue have on the award?

Case Example 6

(Based upon a case at 108 AIS 14.)

FACTS: Grievant was employed as a Nurse Teacher until she was "excused" in 1976. Subsequently another individual was hired as an R.N., and no further Nurse Teachers were employed. The R.N. position was outside of the collective bargaining unit. The grievance concerns the substitution of R.N.'s for Nurse Teachers.

CONTRACT PROVISIONS:

ARTICLE I

Section 1.01 Recognition

> The Board recognizes the Cleveland Hill Education Association as the "exclusive bargaining agent of all professional personnel except administrators. Such recognition shall extend to the maximum period allowed by law.

ARTICLE II

Section 11.02 Subcontracting

> It is agreed between the parties that the School District shall not deny employment to a teacher by allowing an outsider, certified teacher or instructor to teach on a regularly scheduled basis in lieu of the regularly employed certified teacher.

DISTRICT'S ARGUMENTS: (1) The positions of R.N. and Nurse Teacher are different; (2) it is a management right to implement a cost-saving change of policy in employment; (3) the union waived its rights by not grieving the first R.N. that was hired.

UNION'S ARGUMENTS: (1) The substitution of R.N.'s for Nurse Teachers violates the subcontracting provision; (2) the duties of the R.N. and Nurse Teacher are the same; and (3) the position of R.N. belongs within the bargaining unit.

AWARD: The grievance is denied. The fact that a grievance might have been filed at an earlier hiring of an R.N. does not waive the union's rights and is a speculative argument. The position of R.N. is not included in the contract provision because the contract speaks only about teaching positions and the R.N. does not teach. Nothing in the contract prohibits hiring non-teaching personnel. There is a significant difference in the two positions since a Nurse Teacher was a certified person and an R.N. is a non-certified person. The recognition clause does not protect new and different positions from being established outside of the bargaining unit.

QUESTIONS: (1) What type of contract language would be needed to sustain the union's position?

(2) Would "cost saving" be an adequate defense if the R.N. position performed the same functions as a Nurse Teacher?

(3) Could the R.N. be used to teach health classes on an irregular basis (i.e., substitute) without violating the contract provisions noted above?

(4) At what point might the union have waived its right to grieve the creation of new positions? Why would the union not file a grievance at the earliest moment it could?

Case Example 7

(Based upon a case at 103 AIS 8.)

FACTS: The usual practice was for the District to schedule students for half-day attendance at the elementary schools during the last week of the school year. The teachers worked a full day, but the students left after completing a half-day. In the year in question, the District scheduled and the students attended full days.

CONTRACT PROVISIONS:

> Elementary schools shall be open for half days during the last week of school.
>
> If any provisions of this Agreement or any application of the Agreement to any teacher or group of teachers shall be found contrary to law, then such provision or application shall not be deemed valid and subsisting except to the extent permitted by law, but all other provisions or applications shall continue in full force and effect.

DISTRICT'S ARGUMENTS: The District argues that a state regulation now prescribes a school week that does not fall below 25 hours. Following the contract provision for half days would violate the state regulation, hence it becomes unenforceable under the contract provision relating to "provisions . . . found contrary to law." Violation of the state regulation could lead to a loss of state aid.

UNION'S ARGUMENTS: (1) There is no penalty for violation of state regulations except loss of state aid, which is no more significant than violation of the contract. (2) The District could have hired substitutes for the second half of the day to comply with both the contract and the state regulations. (3) The teachers were unable to complete paper work and other administrative assignments during the regular school day, and had to work overtime or beyond regular school hours in order to finish that work.

AWARD: The District violated the contract, but no remedy is warranted. The contract provides for voiding provisions "found" contrary to law. The arbitrator is not empowered to make such a finding and no court has so ruled. Accordingly, the half-day provision is valid and was violated. However, there is no probative evidence to show the teachers actually worked additional hours. The contract has no provision for paying overtime.

QUESTIONS: (1) What remedy, if any, might have been available if teacher overtime were factually proved?

(2) What type (trial or appellate) of court interpretation of the state regulation might have led the arbitrator to void the half-day contract provision?

(3) What other recourse was open to the District before it made the decision to violate the contract and schedule full days?

(4) What might the union do next year when it faces this problem?

(5) Was the arbitrator limited to a "no remedy" award?

Case Example 8

(Based upon a case at 108 AIS 15.)

FACTS: To combat an increasing absenteeism problem, a new attendance policy was unilaterally promulgated by the district. The new policy required the teacher to create, maintain, and refer back to records not previously required. The teachers filed a grievance because of the quantity of extra work which they felt would be required.

CONTRACT PROVISIONS:

> Article IV,E- Except as this Agreement shall otherwise provide, all terms and conditions of employment applicable, on the effective date of this Agreement, to the employees covered by this Agreement established by the rules, regulations and/or policy of the Board in force on said date shall continue to be so applicable during the term in this Agreement, nothing contained herein shall be interpreted and/or applied so as to eliminate, reduce or otherwise detract from any employee benefit existing prior to its effective date.
>
> Article VI - Management Rights -- The Board reserves to itself sole jurisdiction and right, in compliance with the laws of the State of New Jersey and the rulings of the State Commissioner of Education, including: (a) to direct employees of the school district; (b) to hire, promote, transfer, assign and retain employees in positions in the school district and to suspend, demote, discharge, or take disciplinary action against employees for just cause; (c) to relieve employees from duty because of lack of work or other legitimate reasons; (d) to efficiently direct school and district operations; (e) to direct the methods, means, and personnel by which such operations are to be conducted; and (f) to take whatever actions may be necessary to accomplish the mission of the school district. This section shall not be read to repeal or modify any provision of this contract of Title 18A or the laws of the State of New Jersey.

> Article VIII,E - Classroom teachers shall, in addition to their lunch periods, have one (1) full daily preparation period, during which they shall not be assigned to other duties.

DISTRICT'S ARGUMENTS: (1) The District was entitled to promulgate the policy under the management rights clause; (2) the policy did not represent a substantial change from past practices.

UNION'S ARGUMENTS: (1) The policy was a change in the terms and conditions of employment and had to be negotiated either under the contract or as a mandatory topic under the state's collective bargaining law; (2) the policy required an inordinate amount of time which infringed upon the teacher's contractually protected duty free time or preparation period.

AWARD: The policy did not violate the contract. It involves a de minimus amount of extra work. There is a past practice of doing some work of this type during duty free times. The arbitrator will not rule on the effect of the state bargaining law. Jurisdiction will be maintained for 45 days to implement the decision. The arbitrator "strongly" suggests that the District should attempt to work out some of the remaining problems with the forms being used in consultation with the union.

QUESTIONS: (1) Would there be a contract violation if more than a de minimus amount of work was involved?

(2) What is the purpose of the arbitrator retaining jurisdiction?

(3) Why does the arbitrator "strongly" suggest negotiations on the problems when no contract violation was found? '

(4) If the union continues to oppose the policy, what recourse might be available to it?

Case Example 9

(Based upon a case at 106 AIS 3.)

FACTS: Several employees applied for paid leaves of absence to attend a conference for October 21. After granting several requestions, the Board recalled that October 21 was to be a mandatory in-service day, as agreed to in a prior strike settlement. Thereafter it refused to approve additional paid convention leave requests, including those of grievants. It did grant unpaid convention leaves to grievants.

CONTRACT PROVISIONS:

> 5. CONVENTION LEAVE. When it is evident that convention or conference attendance or the observation of an activity in another school building or school system will contribute to the effectiveness of the instructional program, the Superintendent may grant permission to observe an activity in another school building or school system to teachers without loss of pay. The Superintendent may limit the same as to time and the number of individuals involved.
>
> * * *
>
> 9. OTHER LEAVES
>
> * * *

> b. PERSONAL ABSENCE WITHOUT PAY. Any teacher who so requests may be granted personal absence of a reasonable nature by the Superintendent without pay, providing that adequate provisions have been made to insure the continuity of the instructional program. . .

BOARD'S ARGUMENTS: (1) The Board had the discretion to deny convention leave requests; (2) unpaid personal leaves were available, and it would expedite matters to grant an unpaid convention leave without requiring the teacher to reapply for an unpaid personal leave.

UNION'S ARGUMENTS: (1) In-service day did not preclude excused absences and should not preclude paid excused absences; (2) contract provides for paid convention leaves and has no provision for unpaid convention leave.

AWARD: The Board violated the agreement and grievants shall be reimbursed for their convention leave. The contract is plain and unambiguous that all convention leaves are paid leaves. The arbitrator cannot create a new category of unpaid convention leaves. The purposes of the paid and unpaid leave categories differ, and since this leave met the purposes of the paid category (mutual benefit to the school and teacher), it must be treated as a paid category.

QUESTIONS: (1) Does the discretion to deny a leave request generally permit a school district to give a conditional approval of the request?

(2) If the convention leave request had been totally denied, and the grievants went to the convention anyway, would the arbitrator be likely to find they were entitled to a paid leave in these circumstances?

(3) If the grievants had first applied for and received a personal (unpaid) leave, would an arbitrator be likely to favor their subsequent request for a paid convention leave?

(4) Would the arbitrator permit the Board to treat a request for paid convention leave as though it were actually a request for unpaid personal leave?

(5) Under either of these leave provisions, could the Board require that the applicant give reasons for why the leave was requested?

Case Example 10

(Based on a case at 101 AIS 18.)

FACTS: Grievant is a teacher with 27 years experience. Her most recent evaluation read "unsatisfactory" on the topic of "Instructional Responsibilities." The basis of the problem lies in the adoption by the school district of an open classroom, individualized instruction mode of teaching. Grievant continues to teach in a highly structured, disciplinarian type manner. Grievant seeks to have the evaluation modified.

CONTRACT PROVISION:

> . . . As an individual, the educator is entitled to such fundamental rights as dignity, privacy, and respect. . .

. . . The educator accepts responsibility to teach each child to the best of his/her ability with full recognition of that child's individual worth.

RESPONSIBILITIES AND RIGHTS OF EDUCATORS

Educators shall have academic freedom to teach subject to reasonable standards of professional responsibility, applicable Fairfax County School Board policy and due regard for the maturity level of the students involved . . .

The Program Manager or his/her designee (for example . . . Assistant Principal. . .) shall evaluate continually from the beginning of an employee's service in a position and shall maintain written records of the evaluations. Weaknesses in performance shall be identified through observation, work situation visitations, and other appropriate means. When weaknesses in an employee's performance are identified, the Program Manager shall make provision for assistance to the employee.

Within the first nine weeks of an individual's evaluation year, the Evaluator shall meet with the Evaluatee to specifically discuss the process and procedures of evaluation. During this conference, an opportunity shall be provided for the Evaluatee to state tentative goals and objectives for the school year. The Evaluator shall identify his/her expectations of the employee within the framework of the evaluation process. Plans and tentative dates for formal visitations shall be established in this meeting.

While it is recognized that evaluation is an ongoing process, in the case of teacher evaluations the Evaluator shall spend a minimum of the equivalent of two instructional periods during the year the employee's evaluation is to be submitted, visiting with the Evaluatee and observing his/her success in meeting stated goals and objectives. . .

For all educational personnel, provisions should be made throughout the evaluation process for the Evaluatee and the Evaluator to adjust the mutually agreed-upon goals and objectives established in the initial conference. This will provide an opportunity to reassess plans due to unique or unforeseeable situations that might arise from time to time over which neither party has control.

DISTRICT'S ARGUMENTS: (1) Grievant was directed orally and in writing to adopt as an objective the learning of and practice of individualized instruction, and has not complied; (2) grievant was warned, given ways in which to comply, and given time in which to comply.

UNION'S ARGUMENTS: (1) District erred in mandating the manner of teaching; (2) the visitation schedule required under the contract was not followed, and this had an adverse impact on the evaluations; (3) teaching goals must be arrived at by mutual agreement.

AWARD: Grievance denied. While the proper visitation schedule was not followed, it did not result in an unfair evaluation. Nothing in the contract precludes the unilateral setting of teaching goals where mutual agreement is not reached. The contract language, "child's individual worth" is an incorporation of the District's required policy on teaching, and Grievant has failed to comply. The arbitration is not casting doubt on Grievant's ability as a teacher, rather, the arbitrator is sustaining the authority of the Board to select whatever mode of teaching it thinks best.

QUESTIONS: (1) Is the arbitrator generally permitted to redecide the wisdom of a District's policy on the manner of teaching?

(2) Did the District violate the agreement with respect to visitation? Why didn't this violation influence the outcome of the decision?

(3) If the evaluation had been found to be erroneous, what might the Arbitrator have awarded Grievant?

(4) After the award in this case, what recourse does Grievant have?

(5) If Grievant can demonstrate that the open classroom style is not an effective method of teaching for all children, would this change the award in this case?

Case Example 11

(Based upon a case at 100 AIS 4.)

FACTS: Grievant was a probationary teacher who was non-renewed after his second year of teaching. A hearing was given Grievant in accordance with applicable procedures. The reasons for the non-renewal included lack of mature judgment in day-to-day relationships; failure to comply with rules; and failure to meet the expectations of a superior in planning and program evaluation.

CONTRACT PROVISIONS:

Article III-C, Level Four (c) which reads:

> The arbitrator so selected shall confer with the representatives of the Board and the Negotiations Committee and hold hearings promptly and shall issue his decision not later than twenty (20) days from the date of the close of the hearings, or, if oral hearings have been waived, then from the date the final statements and proofs on the issues are submitted to him. The arbitrator's decision shall be in writing and shall set forth his findings of fact, reasoning, and conclusions on the issues submitted. The arbitrator shall be without power to, or authority to make a decision which requires

> the commission of an act prohibited by law or which is violative of the terms of this agreement. The decision of the arbitrator shall be submitted to the Board and the Association and shall be final and binding on the parties except in cases dealing with the non-renewal of a non-tenured teacher during the first two (2) years of employment within the district, which, in such cases, the Arbitrator's decision shall be advisory only.
>
> Article IV-C which reads:
>
> No teacher shall be disciplined, given an adverse evaluation, reprimand, reduced in rank or compensation or deprived of any professional advantage without just cause. Any such action asserted by the Board, or any agent or representative thereof, shall be subject to the grievance procedure herein set forth.
>
> Article XXII-Evaluation, which reads:
>
> No later than September 15, 1972, the Board and the Association agree to establish within each department an Evaluation Committee consisting of three members, one the department chairman, and two other members appointed by the Association, one of whom shall be a member of that department. These committees shall develop criteria and procedures for the evaluations of teachers within their respective departments. These criteria and procedures shall be submitted to the Supervisor of Instruction and, if approved by him, sent to the Board and the Association for adoption as an addendum to this Agreement.

BOARD'S ARGUMENTS: (1) Non-renewal is not a disciplinary action and therefore is not within the scope of "just cause" review; (2) Grievant has received fair and complete consideration.

UNION'S ARGUMENTS: (1) There was no just cause for his dismissal; (2) Grievant was denied due process in that he was not warned of the consequences of his behavior and the rules which he allegedly did not follow are not reasonably related to the mission of the Board.

AWARD: No contract violation. The arbitrator can only determine if there was substantial fairness in the process and if there was substantial factual basis for the action. Because of the seriousness of the matter, the arbitrator will treat it as though "just cause" review is appropriate. Here there was essential fairness in the process and a reasonable factual basis, i.e., just cause. The evidence of personality clash and disagreement on professional goals does not reach the degree where one can say objectively the cause of the action in regard to grievant was anything but based upon professional judgment. Grievant was given notice, an adequate investigation was made, opportunity for correction was given, and the actions were not taken in a discriminatory fashion.

QUESTIONS: (1) Is just cause commonly applied to a non-renewal situation? Is a non-renewal commonly considered to be a disciplinary action? Would the arbitrator's decision to apply just cause criteria be a precedent for other non-renewal cases?

(2) What are the major elements of a just cause determination?

(3) Would evidence of parental and student support for Grievant be likely to change the arbitrator's decision? Should the arbitrator decide whether Grievant was a "good" or "inadequte" teacher?

(4) Can the Arbitrator redetermine the wisdom of the Board's evaluation rules? Can the Arbitrator redetermine the reasonableness of the Board's evaluation rules?

(5) Where is the burden of proof in a non-renewal case? Where is the burden of proof in a discipline case?

(6) Would the result in this case be different if just cause had not been used?

Case Example 12

(Based upon a case at 91 AIS 9.)

FACTS: The District assigned a male applicant to the position of curriculum coordinator and rejected the Grievant, a female applicant.

CONTRACT PROVISIONS:

> Article 1.3: The District shall not discriminate against any employee on the basis of . . . sex. . .
>
> Article 1.4: The District agrees to take affirmative action to ensure that under-representation and under-utilization at all levels of responsibility of members of minority ethnic groups and women and/or men will be corrected.

DISTRICT'S ARGUMENTS: (1) under the affirmative action provision, four out of eight administrative positions have been filled by women and minorities; (2) the goal is to improve the ratio of women and minorities in administrative positions by 10% per year, with a long range goal of a 50-50 ratio, and that goal had been met prior to filling the disputed position; (3) one major focus should be on the anti-discrimination clause.

UNION'S ARGUMENTS: (1) no member of the Superintendent's staff, which includes this position, has ever been a woman; (2) Grievant's interview was conducted in a lackadasical manner; (3) Grievant was better qualified.

AWARD: The contract was violated and Grievant shall be appointed to a position of equal stature prior to the next year, and receive back pay. The District offered no evidence as to the qualifications of the person appointed, and the only evidence in the record is that Grievant was more qualified. A prima facie case was made out by Grievant and no evidence of rebuttal was introduced by the District. Under the Federal law, by analogy, the burden of explanation shifted to the District and was not met after Grievant demonstrated her qualifications.

QUESTIONS: (1) Is it realistic to interpret an anti-discrimination clause in a contract without reference to external (federal) law? Is the arbitrator limited to what is written on the face of the contract?

(2) What is the role of a good prior record in a discrimination grievance? Is a good prior record on affirmative action treated similarly to a good prior record in other grievances, e.g., providing aides when class size exceeds contract limits?

(3) What type of evidence should the District present in this type of case? If the qualifications were equal, under this contract language, how should the arbitrator rule?

Case Example 13

(Based upon a case at 111 AIS 11.)

FACTS: In order to help combat a student drug problem, local police and school administrators secretly placed an undercover police officer, posing as a student, in the classrooms of grievant teachers. The officer reported that the teachers were "clean." When the teachers found out about the tactic they protested. Some people in the community interpreted the teachers' protest as being sympathetic to drug use. As a result, the teachers and their families were subject to a considerable amount of abuse. The teachers filed a grievance seeking monetary damages and administrative assurances against any future use of police in the classroom. Violations of the contract and constitutional rights are alleged.

CONTRACT TERMS:

ARTICLE IV - DEFINITION OF RESPONSIBILITIES AND RIGHTS

Section A

1. The Board agrees that it will not directly or indirectly discourage, deprive, or coerce any teacher in the enjoyment of any rights conferred by the laws or the Constitution of the State of Michigan and the United States and that it will not discriminate against any teacher because of membership in the Association or collective negotiations with the Board, or the institution of any grievance, complaint or proceeding under this Agreement.
2. The Board agrees that its Rules and Regulations governing employee conduct will be reasonable and that enforcement of discipline will be fair and for just cause. The Board and the Association agree that equitable and non-discriminatory treatment shall be afforded all teachers in accordance with the Agreement.

Section B

2. Teachers in fulfilling their obligations to students, fellow professionals and the District should strive to act in a moral, ethical and professional manner in their dealings with people. The Board of Education and administration will do likewise in fulfilling their obligations to the community, students and teachers.

ARTICLE VIII - EVALUATION PROCEDURE

8. Conduct all monitoring or observation of the work performance of a teacher openly and with his knowledge. Audio visual devices shall be used only with the teacher's consent.

ARTICLE XI - STUDENT DISCIPLINE AND TEACHER PROTECTION

Section A

The Board recognizes its responsibility to give all reasonable support and assistance to teachers with respect to the maintenance of control and discipline in the classroom. The Board further recognizes that the teacher may not fairly be expected to assume the ongoing responsibility for emotionally disturbed students nor to be charged with responsibility for psychotherapy. Whenever it appears that a particular pupil requires the attention of special counselors, social workers, law enforcement personnel, physicians, or other professional persons, the Board will take prompt action to assist the teacher with respect to such pupil.

ARTICLE XX - ACADEMIC FREEDOM

Section A

Academic freedom shall be guaranteed to the teacher, and no special limitations shall be placed upon study and investigation of facts and ideas concerning man, human society, the physical and biological world, and other branches of learning, subject to the following standards of professional responsibility:

1. The teacher shall encourage the student to study varying points of view and respect his right to form his own judgment.

SCHOOL'S ARGUMENTS: (1) the secret investigation was not directed at the teachers but was directed at certain suspected students in cooperation with police authorities; (2) the undercover officer was not put into the classroom to conduct surveillance on or evaluate the teachers.

UNION'S ARGUMENTS: (1) use of the undercover agent violated numerous provisions of the contract including the academic freedom and evaluation clauses because it resulted in a secret report on the teachers; (2) the teachers constitutional rights were violated by the school granting permission to the police to use the undercover officer and the resultant community upheaval against the teachers who protested.

AWARD: Grievance denied. The courts, and not the arbitrator, have jurisdiction over allegations of constitutional violation. The school came close to certain violations of the contract, but it acted reasonably to overcome a serious problem. The agreement on the police activity was carefully limited to not include the role of the teachers, even though an unrequested report was filed. The major problem was the community reaction and the arbitrator stated that nothing in the record reflects adversely on them.

QUESTIONS: (1) If a contract expressly preserves a teacher's constitutional rights, should this confer jurisdiction on the arbitrator?

(2) If the grievance had been sustained, is it likely that monetary damages would have been awarded?

(3) In this case, all agreed that the teachers had suffered greatly in fact. Why was this fact not enough to sustain an award?

(4) What could the school have done, if anything, to avoid this personnel problem?

(5) Would the contract be violated if the report about the teachers being "clean" were put into the teachers' personnel files and later considered by the school?

(6) Would it matter in the result if the investigation had been aimed at the teachers as well as at the students?

(7) Did the students have a grievance under the contract?

Case Example 14

(Based upon a case at 82 AIS 19.)

FACTS: Grievants applied for sabbatical leave. The school committee refused to review and evaluate the leave requests because of the budgetary problems.

CONTRACT TERMS:

> ARTICLE III - MANAGEMENT RIGHTS
>
> Except as otherwise specifically provided in this Agreement, or otherwise specifically agreed to in writing between the parties, the determination of educational policy, the operation and management of the schools and the control, supervision and direction of the employees are vested exclusively in the Committee.

ARTICLE XXX - SABBATICAL LEAVE

A. Sabbatical leave may be granted to a teacher for study related to his teaching field, or for travel, related to his teaching field, or for other reasons of value to the school system, all subject to the approval of the Committee and all subject to the following conditions:

1. Sabbatical leave shall be granted to a maximum of two percent of teachers at any one time.

2. Notice of intent to apply for Sabbatical leave must be received by the Office of the Superintendent in writing no later than November 1 of the school year preceding the year of such leave. The teacher must make application no later than February 1 and shall also complete said school year. Action shall be taken by the Committee on all such requests no later than April 1 of the school year preceding the school year for which the Sabbatical leave is requested.

3. The teacher requesting Sabbatical leave has completed at least seven consecutive full-time school years of service in the Portland School System since his last prior Sabbatical leave, if any.

4. A teacher on Sabbatical leave (either for one-half of a school year or for a full school year shall be paid by the Board at 50% of the salary rate which he would have received if he had remained actively employed by the Committee.

5. Upon return from Sabbatical leave, a teacher shall be placed on the salary schedule at the level which he would have attained had he remained actively employed in the system during the period of his absence.

6. Before receiving Sabbatical leave under the provision of this Article, the teacher shall agree in writing with the Committee that he will return to the Portland School System for a period of not less than two years, and also that, in the event of breach of such agreement, he will repay the Committee all sums advanced for his Sabbatical leave, in proportion to the fulfillment of his two year re-employment commitment.

SCHOOL COMMITTEE'S ARGUMENTS: (1) granting or refusing leaves is a management right; (2) leaves are permissive (not mandatory) under the "may be granted" language of the contract; (3) the decision to grant no leaves is functionally the same as the decision to deny each individual request; (4) it is a higher educational priority to have money to hire teachers than to spend it on leaves; and (5) the school is under severe budgetary constraints.

UNION'S ARGUMENTS: (1) nothing in contract makes leaves contingent on the availability of excess funds; (2) the contract provides that "leave shall be granted to a maximum of two percent"; and (3) the contract requires consideration of individual leave requests.

AWARD: The School Committee violated the contract. Leave applications must be evaluated and qualified leaves must be funded (although the School Committee might request negotiations with the union on funding problems). The contract does not give the School Committee the unilateral right to weigh the educational value of leaves against the educational value of other programs. The permissive language "may be granted" applies to the School Committee decision after it has evaluated the leave applications.

QUESTIONS: (1) would it be reasonable for the School Committee to review the leave applications and arrive at a negative result on each one?

(2) Would the result likely have been different if a "true" budgetary crisis existed?

(3) What type of contract language should the School Committee attempt to negotiate in the future to help it achieve the goal it argued for here?

(4) What is the relationship between the broad language of the management rights clause and the more narrow sabbatical leave clause? Is there any limitation in the management rights clause language?

(5) If funding the qualified leaves actually required firing teachers from the classroom or some other re-prioritization of the budget, should the School Committee arguments prevail?

Case Example 15

(Based upon a case at 98 AIS 13.)

FACTS: Tenured Grievant was granted a sabbatical leave for the 1976-77 school year. Grievant held a position as a high school counselor. Midway through the leave, the Grievant was notified that he would be reassigned to teach General Science upon his return from leave.

CONTRACT TERMS:

> Any teacher returning from such a leave will be assigned to a position for which qualified. If requested prior to approval of the leave, consideration will be given and an effort made to place the teacher in his or her former position.
>
> Teachers shall not be transferred to positions for which they are not qualified.

DISTRICT'S ARGUMENTS: (1) the high school position had been eliminated due to declining enrollment and a tight budget; (2) Grievant was certified to teach General Science as well as to counsel; and (3) Grievant had General Science and other teaching experience from 1955-1965.

UNION'S ARGUMENTS: (1) Leave was designed to improve counseling skills, and this had been communicated to District, and Grievant had made personal expenditures based upon this goal; (2) Grievant had received excellent counseling evaluations; (3) District was advertising other counseling positions as being open and had rejected Grievant's application for those positions; (4) Grievant was being treated unfairly or in a discriminatory manner because the District had given no reasons for the transfer; (5) the transfer suggests that the District was "punishing" Grievant because of some secret complaints or other action based upon improper or bad motives.

AWARD: Grievance dismissed. Contract does not guarantee return to former position. Motive is not a factor under the contract and, furthermore, there is no evidence of improper motive. The District is entitled to assign a teacher anywhere within their certification, tenure does not give a vested right to a specific school or class level. The District acted reasonably and did not mislead him in a way to cause him to change his position in reliance upon what the District had said. The Arbitrator relied upon out-of-state judicial case law which supported the decision.

QUESTIONS: (1) what language would be needed in the contract to sustain the Grievant's position?

(2) Could the District reassign Grievant if he had not gone on leave?

(3) What type of evidence would be needed to show improper motive? Why did the union use this argument? What if such evidence existed?

(4) What type of evidence would be needed to show Grievant had justifiably relied upon District statements in structuring his leave?

(5) Does the District's decision meet a "reasonableness" requirement?

(6) Was the arbitrator's use of out-of-state judicial case law a reasonable analogy?

(7) Should the result be the same if the District were making its decision based upon some uncommunicated complaints about Grievant's performance?

(8) To what extent is reassignment generally accepted management right? What could be the sources of this right?

Case Example 16

(Based upon a case at 65 AIS 1.)

FACTS: School administrator ordered Grievants, non-teaching assistants, to move 72 typewriters, weighing 39 pounds apiece, 100 yards from a receiving area to a storage area. Grievants refused, and sought union advice on whether it was within their job description. The next day Grievants participated, with others, in moving the typewriters. A clarification of rights and obligations is sought.

CONTRACT PROVISIONS:

> 2. The duties of NTA's shall be such duties as were heretofore performed by them and such additional non-teaching duties heretofore or presently performed by teachers, which may hereafter be assigned to NTA's by the principal of the school in which they work.
>
> A job description contained the following language:
>
> GENERAL DEFINITION
>
> This is responsible work regulating, monitoring, and directing the activities of pupils outside and within a school building and the adjacent areas whenever they are not engaged in classroom activities. Employees in this class assist the instructional staff in maintaining discipline, order, control, and surveillance; conduct investigations, when necessary, in irregular, disruptive, or major disciplinary situations related to pupils and affecting the schools; and perform a wide variety of routine clerical, and other related duties when not involved in controlling and supervising pupils.
>
> Assignments are received from the Lead NTA and performed under the general supervision of the school's principal or vice principal, who reviews work through periodic inspections and submitted oral and written reports.
>
> TYPICAL EXAMPLES OF WORK (Illustrative Only)
>
> Patrols school buildings and surrounding areas before, during and after school hours maintaining an orderly flow of students in and out of the building; inspects locker areas, play areas, lavatories, fire towers and halls for students who are loitering or are in unauthorized areas or for outsiders who have no business to conduct on the premises; questions students to make sure that they are at their

> proper location; controls incidents which may arise, stops smoking and other unauthorized activities on school property; assists teachers in serious and involved disciplinary cases. Monitors students during lunchroom and recess periods, supervises lateroom and fills out late cards and other forms; issues locks and lockers to students and resolves problems relating to school lockers.
>
> Receives, stores, and issues school supplies and equipment; operates simple duplicating office equipment; does routine filing; fills in routine forms and may perform typing.
>
> May be assigned, transferred or moved to various schools as the need arises.
>
> Performs related work as required.

DISTRICT'S ARGUMENTS: (1) Moving equipment is covered by the job description; (2) the contract contains no express limitations on job duties and no past practice precludes such an obligation.

UNION'S ARGUMENTS: (1) No past practice clearly requires Grievants to perform such a task; (2) the general thrust of the job description is to require Grievants to work with students and teachers, and not to move or be prepared to move large amounts of heavy equipment.

AWARD: Grievance sustained. Order to move 72 typewriters was not reasonable under the circumstances. However, the arbitrator is not ruling that non-teaching assistants may not be required to move typewriters or equipment under any circumstances. The arbitrator discusses other arbitration decisions relating to past practices, but finds that proof of past practices is inadequate here.

QUESTIONS: (1) what was the grievance in this case, since the typewriters were moved?

(2) What is the general rule on employee refusal to carry out a work order?

(3) What is the role of other arbitration decisions?

(4) Will this award provide a useful precedent for future disputes?

(5) What types of evidence would be needed to prove a past practice?

(6) What risk did the Grievants see in following the work order? What risk did the District see in acceding to the Grievants' refusal to do the job?

(7) Should the arbitrator look to things beyond the contract, such as the job description?

Case Example 17

(Based upon a Case at 101 AIS 15.)

FACTS: The School required daily lesson plans. One requirement is for daily plans (prepared on a weekly basis with specific details) and another requirement is for general plans (prepared at the beginning of the school year with general details). Grievant filed a general plan as required, and a daily plan for the week of February 9 through February 14, and did not have a daily plan prepared for the week beginning February 14. Grievant lost $30.00 in pay, the cost of a substitute, for failure to have a prepared daily lesson plan.

CONTRACT PROVISIONS:

1.2 Basic Agreement:

A. The Board agrees that its rules and regulations governing employee conduct will be reasonable, and enforcement of discipline will be fair. No teacher shall be disciplined, reprimanded, reduced in compensation, or deprived of any professional advantage without just cause.

3.2 Teaching Hours/Tardiness:

F. The Association and the Board agree that it is the responsibility of each individual teacher, as well as the Board, to provide the highest quality educational program practicable for every boy and girl in the school district through careful daily preparation. It will be the teacher's responsibility to provide adequate daily lesson plans in case of absence. Failure to have available to a substitute teacher plans which make it possible to carry on a meaningful class will result in a loss in the teacher's salary equal to the cost of a substitute.

3.6 Substitute Teachers:

D. The Administration and teachers will provide each substitute with a sub-teacher kit to provide for adequate information for the job conditions of the day.

SCHOOL'S ARGUMENTS: (1) under the contract, the school district has the sole responsibility and duty to determine whether or not the materials provided make it possible to carry out a meaningful educational class; (2) the daily plan was not prepared and the general lesson plan was for emergency use only. This was not such an emergency.

UNION'S ARGUMENTS: (1) this is a matter of discipline to be measured by just cause; (2) there was no just cause because Grievant was unable to prepare a lesson plan due to his illness.

AWARD: The grievance is allowed and Grievant is to be repaid the $30.00. This is a disciplinary case involving just cause discipline. Part of just cause is to determine whether strict liability was intended and it was not intended here. Here the general lesson plan could have substituted for the daily plan. It was unreasonable to punish grievant in this situation, and hence there was no just cause. However, illness alone is not necessarily a sufficient excuse.

QUESTIONS: (1) where does an arbitrator look to find a definition of just cause when the contract only uses the phrase "just cause"?

(2) Where does an arbitrator look to determine whether "strict liability" for failure to have a daily plan was intended?

(3) Why does the arbitrator say "illness alone is not necessarily an excuse? Will this bind a future arbitrator to use this rationale?

(4) Does the contract provide for any exceptions to the rule requiring adequate daily lesson plans?

(5) What language in the contract indicates that this is or is not a discipline case? If it were found not to be a discipline case, would just cause apply?

Case Example 18

(Based upon a case at 98 AIS 9.)

FACTS: The contract provided for a maximum class size of thirty pupils under most circumstances. Grievants were teaching classes in excess of thirty students and filed grievances.

CONTRACT PROVISIONS:

> Therefore, to continue the sincere effort of the Board in fairly distributing the work load of teachers, the Board reaffirms its intention of not arbitrarily increasing the class size beyond a maximum of thirty (30) pupils which provision shall not be construed to deny any pupil placement in a class wherein such placement could not be achieved in any other feasible manner and also its commitment to establish and create pupil groupings in class size, pupil contact, and daily teaching assignments in conformity with sound educational practice. At the same time the parties shall be governed by such circumstances as available classroom and instructional space, teacher availability, and the school modernization program.
>
> Finally, in certain exceptional instances where no other solution may be achieved by scheduling, the specific facts which suggest an excessive class size or number of pupil contacts shall be reviewed and a resolution found by an understanding reached between the respective teacher and Principal.

SCHOOL'S ARGUMENTS: (1) contract does not provide for an absolute prohibition of classes over thirty pupils, and a violation occurs only when there is arbitrary or capricious conduct in assigning larger classes; (2) the assignment of larger classes was necessitated by budgetary constraints; (3) teacher orders were assigned to help grievants; (4) a prior arbitration on this clause ruled that classes in excess of thirty are sometimes permitted under this clause.

UNION'S ARGUMENTS: (1) The contract states the maximum class size; (2) the consolidation of classes leading to the excessive number of pupils was arbitrary action; (3) the consolidation of classes was not a sound educational policy, particularly when it was done at mid-year, as was the situation here; (4) the matter was not the subject of an understanding between the teacher and principal.

AWARD: No violation of the contract. Consolidation of classes was reasonable in light of budget considerations. There is a trend toward declining enrollments, so class size is likely to decline. The school district sought to lessen the impact by providing teacher aides. This was not an exceptional circumstance (class sizes of only 31 or 32 students) requiring an understanding with the teacher.

QUESTIONS: (1) was the prior arbitration award on the same clause of the contract binding on this arbitrator?

(2) What is an arbitrator likely to do when the union questions the soundness of the educational policy underlying a decision that leads to a grievance? What is the role of management rights in this situation?

(3) Would the result be likely to be the same if the school had not provided teacher aides?

(4) What would constitute an "arbitrary" increase under this contract language? What is the meaning of the word "arbitrary"?

(5) What type of contract language would be needed for the union to win this type of grievance? What role would the budgetary problems play in interpreting the suggested language?

Case Example 19

(Based upon a case at 115 AIS 1.)

FACTS: Grievant, a male PE teacher, was involuntarily transferred from his high school position. Grievant was ranked third overall in seniority, but was the least senior male teacher. Declining enrollment led to the need for a transfer. The school decided to transfer the least senior male teacher in order to maintain gender balance. Grievant refused an offer of a position at the same school but outside of the PE department.

CONTRACT PROVISIONS:

> (The contract provides that transfers shall be made in the inverse order of seniority.)
>
> The Board is not required to meet and negotiate on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion of policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel. . .
>
> The Board has the right and obligation to efficiently manage and conduct the operation of the School District within its legal limitation and to adopt, repeal, or modify policies, rules and regulations insofar as such actions are not inconsistent with the terms of this Agreement.

SCHOOL'S ARGUMENTS: (1) the management rights clause permits the school to determine educational needs and programs; (2) gender balance is needed in the PE department as one of the educational needs; and (3) Grievant was offered a non-PE position in the same school but elected to remain in the PE area, which necessitated the transfer. The transfer was, therefore, Grievant's choice.

UNION'S ARGUMENTS: (1) the contract provides for transfers based on seniority and two female PE teachers were less senior than Grievant; (2) the language of the contract is clear and unequivocal, and must be applied the way it is written.

AWARD: The contract was violated and Grievant should be reinstated. The arbitrator is limited to applying the clear language of the contract and there is no exception for gender-balance. Decisions of other arbitrators support this limitation on the arbitrator's authority.

QUESTIONS: (1) what type of contract language would help the school's position?

(2) Would the result be likely to be the same if the contract listed several other factors in addition to seniority which were to be considered in the event of an involuntary transfer?

(3) Was the transfer voluntary or involuntary when Grievant refused another position at the same school, but one outside the PE department? Under what circumstances would it matter?

(4) Assume that Grievant's reinstatement would lead to the transfer of a female instructor, leaving only one female instructor for lockerroom supervision. Should the arbitrator take this problem into account in reaching a decision? What options might be available to the school?

(5) Is maintenance of gender balance a matter likely to be included within a general management rights clause? Is gender balance a consideration outside of the instructional area of PE?

SCHOOL ARBITRATION: WHAT THE ARBITRATORS ARE DOING

Appendix II - Background of the Study

Introduction: In conducting the research on this study, the authors had a two-fold purpose in mind. The first was to be able to make some general comments upon the field of arbitration within the educational sector of our economy. The foregoing chapters address this goal. The second purpose, addressed herein, is to offer practitioners in the field of arbitration some helpful research tools. Attorneys, educators, and arbitrators may be called upon to research grievance arbitration issues. The following chapter offers a series of indexes for each of the eight issues selected for examination. The reader may find the awards cited in this indexes in either the summaries published by the American Arbitration Association, Arbitration in the Schools Series, or obtain the full text of the opinion on microform from the AAA.

The 840 cases contained in the indexes were also statistically analyzed to show the depth and breadth of the issues arising in arbitration. The figures served as the basis for many of the conclusions made throughout the text. The tables and findings are included herein to give the reader an overall perspective on the individual cases contained in the indexes which follow.

Between 1964 and 1980, approximately 3,266 arbitration decisions have been collected in the series entitled Arbitration in the Schools. From 1969-1973, Volumes 1-40 were reproduced in microforms by KTO Microforms, Millwood, New York, 10546. A total of

1,796 awards were recorded. The authors read all cases from volume 41 to 115 and selected 840 of those cases as the basis of this study.

Issues Considered: Eight issues were chosen for detailed examination: procedure, leaves, extra duties, evaluations, transfers and reassignments, budget, discipline, and discrimination. Some other issues were identified, but there were too few cases for analysis. Table 1.1 illustrates the number of cases found on each issue and the percent they represent of the total cases examined. The most commonly occurring awards were on leaves and extra duty issues. Some of the cases analyzed raised more than one of the nine issues identified. Consequently, while 840 cases were statistically analyzed, Table 1.1 shows the total incidents of each issue as 943. This occurs because cases with multiple issues were counted more than once.

Table 1.1 Rank order of nine issues identified for the study by incidents of occurrence in 840 arbitration awards published by the American Arbitration Association (AAA)

ISSUE	Number of Incidents by Issue	Percent of Total Incidents by Issue
1. Leave	190	20%
2. Extra Duty	178	19%
3. Evaluation	129	14%
4. Budget/Layoff	117	12%
5. Transfer	115	12%
6. Discrimination	79	8%
7. Discipline	70	7%
8. Other	59	6%
9. Academic Freedom	6	1%
Total Incidents of Each Issue	943	99%

Type of Grievant: Four types of grievants were examined: Individual grievants, class or group actions, school districts as grievants, and the union as an organization bringing a claim. Table 1.2 illustrates the number of cases with each type of grievant. The most common grievants are the individual or class grievants. A "class action" grievance was defined as any grievance which involved more than one grievant. There were a large number of class action grievances.

Table 1.2 Rank order of the type of grievant appearing in arbitration awards published by AAA by the number and percent of the cases

Type of Grievant	Number of cases	Percent of total cases
1. Individual	446	53%
2. Class	345	41%
3. Union as an organization	26	3%
4. Unspecified	20	2%
5. School	3	0%
Total Cases	840	99%

Type of Educational Institution: The vast majority of the cases, 93 percent, involved K-12 public school systems. Only 7 percent of the cases involved higher education institutions.

Types of Employees: Each case was examined to determine the type of school employee which is appearing in arbitration, i.e., teacher, custodian, clerk. Table 1.3 illustrates the type of personnel which appeared, and the number of those claims. The teacher employee appears in over 80 percent of the cases.

Teachers were individual grievants in 54 percent of the cases studied. Of this number, 27 percent were individual male grievances and 27 percent were individual female grievances. While men and women appear to be equally represented within the percentage of individual grievances heard, there may nevertheless be a question of inequities based on sex in the arbitral process. Recognizing that the majority of the public school teaching force is female, 66 percent in 1973-1974,[1] the number of grievances expected from females might be proportionately higher than the number of grievances from males. The statistics do not bear this out. Fewer women than men from the teaching ranks are appearing in arbitration with individual grievances relative to their proportional representation with individual grievances relative to their proportional representation in the labor force. However, the actual overall representation of males and females in the grievance process remains unknown because only the sex of individual grievants was measured, the sex of members of a class action was not recorded.

Employees other than teachers, such as clerical and support staff, are a small percentage of all cases reviewed and as a class they appear to be underrepresented in the AAA awards. There appears to be greater underrepresentation of non-teaching personnel in public school systems than in institutions of higher education. In the public schools 85 percent of 665 cases concerned teaching employees while only 15 percent or 116 cases involved employees other than teachers. In higher education, 70 percent of the cases

Table 1.3 Rank order of the type of employee appearing in arbitration awards published by AAA according to the number and percent of the cases analyzed

Type of Employee	Number of Cases	Percent of Total Cases
1. Teacher Employee	706	84%
2. Custodian/maintenance	28	3%
3. Administrator	23	3%
4. Unspecified	21	2%
5. Counsellor	15	2%
6. Aide	11	1%
7. Nurse	6	1%
8. Secretary	6	1%
9. Bus Driver	5	1%
10. Security Guard	4	0%
11. Other	15	2%
Total Cases	840	100%

concerned teaching employees while 30 percent were from non-teaching employees. Forty-two percent[2] of the personnel in higher education are non-professional. Fifty-eight percent[3] of the personnel are professional staff, including instructional and research positions.

Win-Loss Record: Of the cases studied, the grievant won approximately 54 percent of the awards rendered by the arbitrator, while the school won approximately 43 percent of the decisions. The chance of winning a grievance is about the same for classes of employees as for individuals. Grievants won 57 percent of the class action grievances and 54 percent of the individual grievances. School districts won 42 percent of the class action grievances and 54 percent of the individual grievances. In both class actions and individual grievances the grievant appears to have a better chance of winning than the school district.

However, the chances change slightly when individual male and female grievances are identified and compared. School districts win more of the grievances involving individual male employees than they win cases involving individual female employees. Schools win five out of ten cases involving a male employee (51 percent male grievant--46 percent school district). The school wins only four out of ten of the cases involving a female employee (58 percent female grievant--40 percent school).

The chances of winning or losing are approximately the same on all seven issues selected for examination: leave, extra duty, evaluation, budget and layoff, transfer, discrimination, and discipline. Table 1.4 depicts the number and percent of incidents in which employers or employees won their cases in arbitration. Employees won from 44 percent to 56 percent of the cases, employers won from 41 percent to 49 percent of the cases. Employers seemed to consistently lag behind the percentage won by employees, with the exception of discrimination disputes in which the employer won 47 percent while the employee won 44 percent.

Table 1.4 Rank order of seven issues arising in arbitration by the type of winner

Issue	Winner			Total Incidents of Each Issue
	Employee	Employer	Undetermined	
1. Leave	104/55%	79/42%	7/4%	190/101%
2. Extra Duty	100/56%	75/42%	3/2%	178/100%
3. Evaluation	72/56%	53/41%	4/3%	129/100%
4. Budget	65/56%	48/41%	4/3%	117/100%
5. Transfer	58/50%	56/49%	1/1%	115/100%
6. Discrimination	35/44%	37/47%	7/9%	79/100%
7. Discipline	37/53%	29/41%	4/6%	70/100%
Overall winner on above issues	471/54%	377/43%	30/3%	878/100%

Type of Grievance--Issues: A published AAA grievance involving an individual is most likely to discuss issues of leave, evaluation, transfer, discipline, and discrimination. A class action grievance is more frequently filed for issues of extra duties and budget. See Table 1.5 for the number of cases filed, by type of grievance, on each issue.

Table 1.5 List of three types of grievants appearing in arbitration cases published by AAA by issue raised in the case

Type of Grievant	Issue									Overall Incidents of each Grievant
	Leave	Extra Duty	Evaluation	Budget & Layoff	Transfer	Discrimination	Discipline	Other	Academic Freedom	
Individual	121/64%	38/21%	105/81%	50/43%	74/64%	54/68%	54/77%	15/25%	2/33%	438/52%
Class	59/31%	134/75%	18/14%	55/47%	31/27%	18/23%	12/17%	27/46%	4/67%	358/38%
Not Class or Individual	10/5%	6/3%	6/5%	12/10%	10/9%	7/9%	4/6%	17/29%	0/0%	72/8%
Total Incidents of Each Issue	190/100%	178/99%	129/100%	117/100%	115/100%	79/100%	70/100%	59/100%	6/100%	943/100%

Overall, individual male and female grievants are likely to raise similar issues in the published AAA awards. Both appear most frequently in cases in which the issue is leave followed in importance by issues of evaluation. See Table 1.6 for a complete breakdown of issues analyzed by type and sex of grievant.

Table 1.6 List of nine issues selected for analysis by type and sex of grievant appearing in 840 arbitration cases published by AAA

Issue	Type of Grievant				Overall Incidents of Each Issue
	Individual Female	Individual Male	Class	Not Class/ Individual	
1. Leave	74/29%	47/18%	59/16%	10/14%	190/20%
2. Extra Duty	15/6%	23/9%	134/37%	6/8%	177/19%
3. Evaluation	49/19%	56/22%	18/5%	6/8%	129/14%
4. Budget and Layoff	29/11%	21/8%	55/15%	12/17%	117/12%
5. Transfer	33/13%	41/16%	31/9%	10/14%	115/12%
6. Discrimination	37/14%	17/7%	18/5%	7/10%	79/8%
7. Discipline	13/5%	41/16%	12/3%	4/6%	70/7%
8. Other	7/3%	8/3%	27/8%	17/24%	59/6%
9. Academic Freedom	1/0%	1/0%	4/1%	0/0%	6/1%
Total Incidents of Each Grievant	258/100%	255/99%	358/99%	72/101%	943/100%

However, some male-female differences occur given a particular issue. Table 1.7 illustrates the number and percentage of different types of grievants appearing on a particular issue. The greatest disparity exists between male and female grievants appearing on the issue of discipline. Males appear in 41 percent of the discipline disputes; females appear in only 13 percent of these disputes, a difference of 28 percentage points. Therefore, a male is approximately three times more likely than a female to be the grievant in published AAA awards when the issue involved is discipline.

Table 1.7 List of four types of grievants appearing in arbitration cases published by AAA by issue raised in the case

Type of Grievant	Issue									Overall Incidents of Each Grievant on All Issues
	Leave	Extra Duty	Evaluation	Budget & Layoff	Transfer	Discrimination	Discipline	Other	Academic Freedom	
Individual Female	74/39%	15/8%	49/38%	29/25%	33/29%	37/47%	13/19%	7/12%	1/17%	258/27%
Individual Male	47/25%	23/13%	56/43%	21/18%	41/36%	17/22%	41/59%	8/14%	1/17%	255/27%
Class	59/31%	134/75%	18/14%	55/47%	31/27%	18/23%	12/17%	27/46%	4/6%	358/38%
Not Class or Individual	10/5%	6/3%	6/5%	12/10%	10/9%	7/9%	4/6%	17/29%	0/0%	72/8%
Total Incidents of Each Issue	190/100%	177/99%	129/100%	117/100%	115/101%	79/101%	70/101%	59/101%	6/101%	943/100%

Footnotes

1. Grant, Vance W. and George C. Lind. Digest of Education Statistics, 1979; U.S. Department of Health, Education, and Welfare, National Center for Education Statistics, Washington, D.C. (January 1979), p. 54.
2. *Ibid*. P. 101.
3. *Ibid*.

SCHOOL ARBITRATION: WHAT THE ARBITRATORS ARE DOING

Appendix III - Award Indexes

Introduction: The following tables contain citations to the AAA Arbitration In the School series by issue and by issue and winner. The issues which are indexed are those which were the seven primary issues selected for study. It must be recognized that there are hundreds, if not thousands, of other arbitration decisions which are not reflected in this index. Not all cases in the Arbitration In the School series are included in this index. Not all school arbitration awards are included in the AAA series. The criteria for inclusion in the AAA seires include the following:

1. Neither party has objected to publication.
2. The issue in dispute is of general interest to the readers.
3. Effort to attain variety of issues reported.
4. Consideration is given to arbitrators who have not previously been extensively reported, i.e., cases of new arbitrators are given extra consideration.
5. Effort is made to attain a geographical mix.

The authors selected cases from the AAA series for this index based upon the nature of the dispute or award, the quality and reasoning of the discussion, and the clarity of the presentation, within the limits of the seven identified topics. This index represents both objective and subjective elements.

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NOTE: All citations in this index are to the Arbitration in the Schools (AIS) series. The first number is a reference to the report number in the AIS series. The second number is a reference to the case number within an identified report. For example, the citation 49-16 means Report No. 49, Arbitration In the Schools, Case No. 16.

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97-18
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97-16
97-1[illegible]
97-9
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95-8
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95-4
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94-3
93-11
93-7
93-4
93-3
93-1
92-8
91-25
91-20
91-18
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91-5
90-14
90-4
89-22
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Extra Duty (continued)

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88-9
88-6
87-10
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86-16
86-8
85-21
85-15
85-4
84-18
84-14
84-5
83-21
83-12
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83-2
82-20
82-13
81-11
81-9
80-23
80-12
80-6
80-1
79-20
79-14
79-10
79-2
78-10
78-9
78-7
78-1
77-20
77-18
77-17
77-11
77-3
76-23
76-20
76-13
76-9
76-8
75-14
75-13
75-1
74-14
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Extra Duty (continued)

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74-7

74-5

74-1

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73-14

73-11

73-10

73-8

73-1

72-6

71-13

71-11

71-6

70-18

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70-15

70-2

70-1

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69-1

68-6

67-6

65-1

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C. Evaluation

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115-15
114-6
114-1
113-13
112-18
112-12
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111-1
110-8
109-17
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104-10
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104-7
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101-11
100-12
100-9
100-4
99-12
99-7
99-4
99-1
98-20
98-19
98-18
98-15
98-12
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98-1
97-20
96-7
95-19

Evaluation (continued)

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95-2
94-22
94-21
94-20
94-8
93-17
93-8
93-6
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92-10
92-9
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92-2
91-24
91-13
90-13
89-23
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89-3
88-14
88-13
88-1
87-24
87-17
85-18
85-17
85-8
84-18
84-7
83-16
83-14
83-7
82-21
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81-17
81-14
80-7
79-19
79-18
77-15
77-8
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75-2
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Evaluation (continued)

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74-3
73-25
73-22
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72-3
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64-4
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61-22

D. Budget and Reduction in Force

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115-14
115-8
115-3
114-5
112-20
112-16
112-11
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112-6
111-20
111-3
110-13
110-3
110-1
109-9
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109-2
108-14
108-10
108-7
107-19
107-15
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106-22
105-20
105-13
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103-4
102-20
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Budget and Reduction in Force (continued)

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93-15
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89-13
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81-20
81-8
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80-13
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80-5
80-2
79-17
79-9
79-1
78-16
78-1
77-6
77-1
76-23
75-22

Budget and Reduction in Force (continued)

75-17

75-8

75-5

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72-18

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E. Transfer and Reassignment

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115-19
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115-12
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113-15
112-14
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111-17
111-15
111-13
111-8
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110-16
110-11
108-21
108-14
107-15
107-14
107-13
107-5
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105-7
103-13
102-20
102-15
102-10
102-1
101-10
101-8
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99-14
99-10
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Transfer and Reassignment (continued)

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97-8
97-4
96-21
96-5
96-4
96-1
95-19
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95-15
95-14
95-12
95-7
94-9
94-1
93-15
93-2
92-23
92-17
92-16
92-12
91-21
91-14
91-10
91-1
90-12
89-9
89-2
88-14
87-12
87-6
86-13
85-11
84-16
83-11
83-9
83-3
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80-18
77-21
77-10
77-8
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75-11
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Transfer and Reassignment (continued)

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72-20

72-7

71-16

71-14

71-7

70-21

70-10

70-6

70-5

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67-15

67-5

66-16

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F. Discrimination

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111-18
111-14
111-13
110-20
110-12
109-6
108-20
108-18
108-4
108-3
107-20
107-15
107-8
106-19
105-19
105-13
104-8
103-5
102-10
100-9
99-22
99-13
98-20
98-11
97-23
97-22
96-5
95-18
94-8
93-9
92-20
92-15
91-19
91-9
90-10
90-8
89-11
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81-17
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Discrimination (continued)

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79-5
76-6
75-18
74-18
74-13
72-21
71-1
70-23
70-11
70-10
70-5
69-19
67-12
67-1
65-2
64-18
61-11
60-20
60-19
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57 - LE - 13
57 - ER - 8
56 - EB - 14
55 - AL - 5
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44 - DE - 9

G. Discipline

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115-13
115-11
113-16
113-8
112-2
111-11
111-9
111-2
110-9
110-7
109-18
108-12
108-11
108-5
107-12
107-9
107-6
107-1
106-21
105-16
105-10
104-13
104-5
103-23
103-22
103-9
103-6
103-1
102-17
101-15
101-13
101-11
99-9
98-8
97-15
96-3
96-2
94-11
89-5
89-3
88-22
88-20
87-25
84-9
84-7
82-15
82-4
76-19
75-10

Discipline (continued)

74-15

74-13

74-8

73-23

72-17

72-13

72-1

71-22

70-11

70-4

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68-11

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II. Citations to American Arbitration Association Awards *Arbitration in the Schools* Series, by Seven Categorized Issues

A. Leave

1. Individual School Employee Wins the Award

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114-9
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113-19
113-4
112-15
112-8
111-19
110-20
110-17
109-15
109-14
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108-18
108-8
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107-2
106-13
106-7
106-6
105-18
104-3
104-2
103-5
102-7
101-15
101-4
99-8
99-5
99-2
98-10
98-2
96-22
96-12
96-9
95-18
95-11
95-1
94-6
91-23
91-8

Individual School Employee Wins the Award (continued)

90-15
88-10
88-8
87-18
86-20
86-6
85-3
84-1
82-10
82-5
78-21
78-15
75-19
75-18
75-10
75-3
74-18
73-28
73-17
72-22
72-10
71-22
70-23
70-13
69-2
66-7
57-L-10
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2. School Employer Wins the Award Against An Individual School Employee

115-4
115-2
114-20
114-11
111-4
110-10
109-16
109-11
108-4
107-11
106-20
106-19
106-4
104-11
103-17
102-13
100-23
100-7
99-15
98-20
98-17

School Employer Wins the Award Against an Individual School Employee (continued)

98-13
97-7
95-6
94-4
93-9
92-13
92-1
91-19
91-16
91-12
89-1
88-15
88-3
85-7
85-1
84-4
83-23
83-22
77-19
77-7
77-4
74-9
74-6
74-4
73-13
73-5
73-2
72-16
72-5
71-8
71-2
60-4
55-AL-5

3. Class of School Employees Win the Award

116-11
113-21
113-7
113-1
111-7
109-7
109-2
106-14
106-3
105-15

Class of School Employees Win the Award (continued)

103-19
103-10
99-17
97-21
97-5
96-20
94-15
90-24
87-11
82-19
80-19
80-10
79-16
79-9
79-4
77-13
73-24
73-18
73-7
71-12
71-3
70-8
70-3
68-4
67-11

4. School Employer Wins the Award Against a Class of Employees

115-5
113-3
112-17
112-10
112-3
110-4
109-10
105-6
100-21
100-20
100-10
99-13
97-3
96-13
95-16
90-10
85-5
85-2
80-17
80-2

School Employer Wins the Award Against a Class of Employees (continued)

79-17

76-2

75-21

72-21

72-9

B. Extra Duty

1. School Employee(s) Wins the Award

116-18
116-14
116-9
115-9
114-22
114-8
113-23
113-18
113-12
113-6
112-22
111-12
110-19
110-15
108-9
108-6
106-23
106-22
106-17
106-12
106-5
106-1
104-17
103-15
103-14
103-8
102-17
102-16
102-14
102-9
102-8
101-14
101-11
101-9
100-15
100-1
98- 16
97-16
97-9
97-1
96-11
96-10
95-8
95-5
94-17
93-11
93-3
93-1

School Employee(s) Wins the Award (continued)

92-8
91-18
91-17
91-5
90-14
89-16
88-12
88-9
87-7
86-8
85-21
84-5
83-21
83-12
83-2
82-20
80-12
80-6
79-20
79-14
79-10
79-2
78-9
78-7
78-1
77-20
77-11
77-3
76-23
75-13
75-1
74-12
74-11
74-10
74-7
74-5
73-26
73-14
73-11
73-10
73-8
71-6
70-17
70-15
70-2
70-1
69-6
69-1
68-6
65-1

School Employee(s) Wins the Award (continued)

61-21

61-20

60-16

2. School Employer Wins the Award

116-7
116-4
114-27
114-18
114-3
113-10
112-19
110-18
108-15
107-18
106-11
104-18
103-18
103-16
103-11
103-3
103-2
102-6
102-4
101-12
101-6
100-12
100-8
100-3
100-2
99-21
99-6
99-3
98-22
98-21
98-9
97-19
97-18
97-17
97-10
95-20
95-4
94-16
94-3
93-7
93-4
91-25

School Employer Wins the Award (continued)

91-20
90-4
89-22
89-7
88-6
87-10
86-16
85-15
85-4
84-18
84-14
83-10
83-5
82-13
81-11
81-9
80-23
80-1
78-10
77-18
77-17
76-20
76-13
76-9
76-8
75-14
74-14
74-1
73-1
72-6
71-13
71-11
70-18
67-6
58-A-16
50-W-14

C. Evaluation

1. School Employee(s) Wins the Award

114-6
112-18
112-12
111-1
107-16
107-8
106-24
106-23
105-12
104-20
104-10
104-9
104-7
102-17
102-11
102-2
101-13
101-11
100-9
99-12
99-4
99-1
98-18
98-15
98-4
96-7
94-21
93-17
93-8
93-6
92-10
92-9
92-6
92-4
92-2
91-24
91-13
90-13
89-23
88-14
87-24
87-17
85-18
85-8
83-7
82-21
82-18
82-15

School Employee(s) Wins the Award (continued)

82-12
82-9
81-17
81-14
79-19
79-18
77-15
77-8
76-15
74-3
73-4
72-15
72-3
71-9
70-20
70-19
69-17
66-6
66-3
66-2
65-3
64-4
62-20

2. School Employer Wins the Award

116-3
115-15
114-1
113-13
111-5
110-8
109-17
108-22
108-21
108-20
108-16
106-18
105-9
103-21
101-18
100-12
100-4
99-7
98-20
98-19
98-12
98-1
97-20
95-19

School Employer Wins the Award (continued)

95-9
95-2
94-22
94-20
94-8
92-18
92-13
89-17
89-3
88-13
88-1
85-17
84-18
84-7
83-16
83-14

80-7
75-2
74-22
74-20
73-25
73-6
72-18
72-14
72-11
71-15
70-7
69-20
69-4
67-9
61-22

D. Budget and Reduction in Force

1. Individual School Employee Wins the Award

115-17
115-14
115-3
112-11
110-1
106-23
106-22
105-13
105-11
102-2
101-17
101-10
101-8
101-2
99-22
99-10
96-17
96-14
95-17
92-6
89-13
87-18
87-7
87-2
84-21
84-2
81-8
77-6
75-17
70-16
70-13

2. School Employer Wins the Award Against An Individual Employee

115-8
112-7
110-3
108-14
108-10
107-19
107-15
105-20
102-15
102-1
98-13
98-7
93-2

School Employer Wins the Award Against an Individual Employee (continued)

92-21
90-23
84-3
80-7
78-16
72-18
71-21

3. Class of School Employees Win the Award

116-2
114-5
112-20
112-6
111-20
109-8
109-2
108-7
103-4
102-20
102-3
100-17
95-12
94-13
93-3
93-1
92-14
88-21
87-16
82-19
81-20
80-13
80-5
79-9
79-1
78-1
77-1
76-23
75-5
73-24
70-22
70-20
66-14

4. School Employer Wins the Award Against a Class of Employees

112-16

111-3

110-13

109-9

105-3

104-24

104-16

104-4

102-6

99-23

99-20

98-14

98-9

96-8

93-15

93-12

91-15

90-21

89-8

85-6

83-13

83-8

80-15

80-2

79-17

75-22

75-8

50-KX-13

E. Transfer and Reassignment

1. School Employee(s) Wins the Award

116-17
115-21
115-19
115-14
115-1
114-14
114-4
113-17
113-16
112-1
111-20
111-17
111-13
110-11
107-14
107-13
107-5
106-9
103-13
102-20
102-10
101-10
101-8
100-22
99-10
97-8
97-4
96-4
96-1
95-17
95-15
95-12
94-1
92-23
92-17
92-12
91-21
89-9
88-14
87-12
84-16
83-11
83-9
83-3
77-10
77-8
75-15
75-13

School Employee(s) Wins the Award (continued)

75-11
74-17
74-2
73-3
72-20
70-21
70-6
69-12
67-5
66-16

2. School Employer Wins the Award

115-18
115-12
115-6
114-13
113-20
113-15
112-14
112-5
112-4
111-15
111-8
111-4
111-3
110-18
110-16
108-21
108-14
107-15
107-4
105-7
102-15
102-1
100-13
99-14
98-13
98-5
96-21
96-5
95-19
95-14
95-7
94-9
93-15
93-2
92-16
91-14
91-10
91-1

School Employer Wins the Award (continued)

90-12
89-2
87-6
86-13
85-11
80-22
80-18
77-21
75-20
75-12
74-19
72-7
71-16
71-14
71-7
70-10
70-5
67-15
56-A-13

F. Discrimination

1. Individual Female Employee Wins the Award

113-AIS-5
111-13
110-20
108-18
107-20
107-8
105-13
103-5
102-10
100-9
97-22
95-18

92-20
91-9
86-20
82-21
81-17
79-5
75-18
74-18
70-23
60-19
57-LE-13

2. School Employer Wins the Award Against an Individual Female Employee

108-4
108-3
107-15
106-19
105-19
98-20
94-8
93-9

86-2
81-21
76-6
71-1
70-5
64-18
55-AL-5

3. Individual Male Employee Wins the Award

115-AIS-1
99-22

98-11
89-11

Individual Male Employee Wins the Award (continued)

85-3

79-7

48-AX-2

4. School Employer Wins the Award Against an Individual Male Employee

111-14

110-12

108-20

96-5

92-15

91-19

89-4

74-13

70-11

70-10

65-2

5. Class of School Employees Win the Award

97-23

90-8

82-3

80-20

69-19

67-12

61-11

6. School Employer Wins the Award Against a Class of School Employees

111-18

109-6

104-8

99-13

90-10

86-14

83-17

72-21

67-1

60-20

58-EM-15

57-ER-8

56-EB-14

44-DE-9

G. Discipline

1. School Employee(s) Wins the Award

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115-13
115-11
113-16
113-8
112-2
111-9
110-9
110-7
108-12
107-6
105-10
103-9
103-1
102-17
101-15
101-13
101-11
99-9
97-15
96-2
89-5
88-22
87-25
84-9
82-15
76-19
75-10
74-15
74-8
73-23
72-17
72-13
71-22
70-4
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65-21
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2. School Employer Wins the Award

111-11
111-2
109-18
108-11
108-5
107-12
107-9
107-1
106-21

School Employer Wins the Award (continued)

105-16
104-13
104-5
103-23
103-22
103-6
98-8
96-3
94-11
89-3
88-20
84-7
82-4
74-13
72-1
70-11
69-16
68-16
68-3
66-7
65-13
64-7